THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1994 CUMULATIVE SUPPLEMENT

Volume 12

Chapters 90 through 97

Prepared under the Supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

Under the Direction of

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Annotated through 443 S.E.2d 468. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

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Preface

This Cumulative Supplement to Volume 12 contains the general laws of a permanent nature enacted by the General Assembly through the 1993 (Reg. Sess., 1994) Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P. O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1993 (Reg. Sess., 1994) Session affecting Chapters 90 through 97 of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 336, p. 77.
North Carolina Court of Appeals Reports through Volume 114, p. 505.
South Eastern Reporter 2nd Series through Volume 443, p. 468.
Federal Reporter 3rd Series through Volume 21, p. 1127.
Federal Supplement through Volume 848, p. 212.
Federal Rules Decisions through Volume 154, p. 535.
Bankruptcy Reports through Volume 166, p. 498.
Supreme Court Reporter through Volume 114, p. 1877.
North Carolina Law Review through Volume 72, p. 1128.
Wake Forest Law Review through Volume 29, p. 646.
Campbell Law Review through Volume 16, p. 145.
Duke Law Journal through Volume 43, p. 1348.
North Carolina Central Law Journal through Volume 20, p. 229.
Opinions of the Attorney General.

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The General Statutes of North Carolina
1994 Cumulative Supplement

VOLUME 12

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ARTICLE 1.

Practice of Medicine.

§ 90-2. Board of Examiners.

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For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 90-12. (Effective October 1, 1994 — See editor's note) Limited license.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-15. License fee; salaries, fees, and expenses of Board.

Each applicant for a license by examination shall pay to the Board of Medical Examiners of the State of North Carolina a fee which shall be prescribed by the Board in an amount not exceeding the sum of four hundred dollars ($400.00) plus the cost of test materials before being admitted to the examination. Whenever a license is granted without examination, as authorized in G.S. 90-13, the applicant shall pay to the Board a fee in an amount to be prescribed by the Board not in excess of two hundred fifty dollars ($250.00). Whenever a limited license is granted as provided in G.S. 90-12, the applicant shall pay to the Board a fee not to exceed one hundred fifty dollars ($150.00), except where a limited license to practice in a medical education and training program approved by the Board for the purpose of education or training is granted, the applicant shall pay a fee of twenty-five dollars ($25.00). A fee of twenty-five dollars ($25.00) shall be paid for the issuance of a duplicate license. All fees shall be paid in advance to the Board of Medical Examiners of the State of North Carolina, to be held in a fund for the use of the Board. The compensation and expenses of the members and officers of the the Board and all expenses proper and necessary in the opinion of the Board to the discharge of its duties under and to enforce the laws regulating the practice of medicine or surgery shall be paid out of the fund, upon the warrant of the Board. The per diem compensation of Board members shall not exceed two hundred dollars ($200.00) per day per member for time spent in the performance and discharge of duties as a member. Any unexpended sum or sums of money remaining in the treasury of the Board at the expiration of the terms of office of the members of the Board shall be paid over to their successors in office.

For the initial and annual registration of an assistant to a physician, the Board may require the payment of a fee not to exceed a reasonable amount. (1858-9, c. 258, s. 13; Code, s. 3130; Rev., s. 4501; 1913, c. 20, ss. 4, 5; C.S., s. 6619; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 7; 1953, c. 187; 1969, c. 929, s. 4; 1971, c. 817, s. 2; c. 1150, s. 5; 1977, c. 838, s. 4; 1979, c. 196, s. 1; 1981, c. 573, s. 15; 1983 (Reg. Sess., 1984), c. 1063, s. 1; 1985, c. 362, ss. 1-3; 1987, c. 859, ss. 13, 14; 1993 (Reg. Sess., 1994), c. 566, s. 2.)

Editor's Note. — This section was amended by Session Laws 1993 (Reg. Sess., 1994), c. 566, s. 2, in the coded bill drafting format provided by § 120-20.1. In the sixth sentence of the first paragraph, the substitution of "the Board" for "said Board" by that act resulted in the language "the the Board." The section has been set out in the form above at the direction of the Revisor of Statutes.

Effect of Amendments. — The 1993

(Reg. Sess., 1994) amendment, effective June 16, 1994, in the first sentence deleted "treasurer of the" preceding "Board" and substituted "the Board" for "said Board"; in the second sentence substituted "a license" for "any license" and deleted "the treasurer of" preceding "the Board"; in the third sentence deleted "the treasurer of" preceding "the Board"; in the fifth sentence deleted "treasurer of the" preceding "Board," substituted "in" for "by him as," and substituted "the Board" for "said Board"; in the sixth sentence substituted "the Board" for "said Board," substituted "the fund" for "said fund," and substituted "Board" for "said Board and all expenses proper and necessary in the opinion of the officers and members of said Board shall be fixed by the Board but"; in the seventh sentence added "The per diem compensation of Board members" at the beginning, substituted "two hundred dollars ($200.00)" for "one hundred dollars ($100.00)," deleted "his" preceding "duties," deleted "of said Board, and reimbursement for travel and other necessary expenses incurred in the performance of his duties as a member of said Board" from the end; and in the eighth sentence substituted "the Board" for "said Board," and substituted "of the Board" for "thereof."

§ 90-15.1. Registration every two years with Board.

Every person licensed to practice medicine by the Board of Medical Examiners shall, during the month of January in every odd-numbered year, register with the Board. A person who registers with the Board shall report to the Board the person's name and office and residence address and any other information required by the Board, and shall pay a registration fee fixed by the Board not in excess of two hundred dollars ($200.00). A physician who fails to register when required shall pay an additional fee of twenty dollars ($20.00) to the Board. Should a physician fail to register and pay the fees imposed, and should such failure continue for a period of 30 days, the license of such physician may be suspended by the Board, after notice and hearing at the next regular meeting of the Board. Upon payment of all fees and penalties which are due, the license of the physician may be reinstated, subject to the Board requiring the physician to appear before the Board for an interview and to comply with other licensing requirements. (1957, c. 597; 1969, c. 929, s. 5; 1979, c. 196, s. 2; 1983 (Reg. Sess., 1984), c. 1063, s. 2; 1987, c. 859, s. 12; 1993 (Reg. Sess., 1994), c. 566, s. 1.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective June 16, 1994, in the first sentence, deleted "heretofore or hereafter" preceding "licensed," substituted "the Board" for "said Board," deleted "January, 1958, and during the month of" preceding "January," substituted "odd-numbered year" for "even numbered year thereafter," and deleted "secretary treasurer of said" preceding "Board" at the end; in the second sentence substituted "A person who registers with the Board shall report to the Board the person's" for "his," substituted "any other" for "such other," substituted "required by the Board, and" for "as the Board may deem necessary and," and substituted "two hundred dollars ($200.00)" for "one hundred dollars ($100.00)"; and in the third sentence substituted "A" for "In the event a," inserted "who," substituted "when required" for "as herein provided he," and substituted "fee" for "amount."

§ 90-16. Board to keep record; publication of names of licentiates; transcript as evidence; receipt of evidence concerning treatment of patient who has not consented to public disclosure.

The Board of Examiners shall keep a regular record of its proceedings in a book kept for that purpose, together with the names of the members of the Board present, the names of the applicants for license, and other information as to its actions. The Board of Examiners shall cause to be entered in a separate book the name of each applicant to whom a license is issued to practice medicine or surgery, along with any information pertinent to such issuance. The Board of Examiners shall publish the names of those licensed in three daily newspapers published in the State of North Carolina, within 30 days after granting the same. A transcript of any such entry in the record books, or certificate that there is not entered therein the name and proficiency or date of granting such license of a person charged with the violation of the provisions of this Article, certified under the hand of the secretary and the seals of the Board of Medical Examiners of the State of North Carolina, shall be admitted as evidence in any court of this State when it is otherwise competent.

The Board may in a closed session receive evidence involving or concerning the treatment of a patient who has not expressly or impliedly consented to the public disclosure of such treatment as may be necessary for the protection of the rights of such patient or of the accused physician and the full presentation of relevant evidence. All records, papers and other documents containing information collected and compiled by the Board, or its members or employees as a result of investigations, inquiries or interviews conducted in connection with a licensing or disciplinary matter shall not be considered public records within the meaning of Chapter 132 of the General Statutes; provided, however, that any notice or statement of charges against any licensee, or any notice to any licensee of a hearing in any proceeding shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of any such investigation, inquiry or interview; and provided, further, that if any such record, paper or other document containing information theretofore collected and compiled by the Board, as hereinbefore provided, is received and admitted in evidence in any hearing before the Board, it shall thereupon be a public record within the meaning of Chapter 132 of the General Statutes.

In any proceeding before the Board, in any record of any hearing before the Board, and in the notice of the charges against any licensee (notwithstanding any provision herein to the contrary) the Board may withhold from public disclosure the identity of a patient who has not expressly or impliedly consented to the public disclosure of treatment by the accused physician. (1858-9, c. 258, s. 12; Code, s. 3129; Rev., s. 4500; C.S., s. 6620; 1921, c. 47, s. 6; 1977, c. 838, s. 5; 1993 (Reg. Sess., 1994), c. 570, s. 6.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, but not applicable to pending litigation, substituted "a closed session" for "an executive session" in the first sentence of the second paragraph.

§ 90-18. (Effective October 1, 1994 — See editor's note) Practicing without license; practicing defined; penalties.

Editor's Note. —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 1B.

Medical Malpractice Actions.

§ 90-21.11. Definitions.

CASE NOTES

Cited in Reich v. Price, 110 N.C. App. 255, 429 S.E.2d 372 (1993).

§ 90-21.12. Standard of health care.

Legal Periodicals. —

For note, "Liability in the Absence of a Traditional Physician-Patient Relationship: What Every 'On Call' Doctor Should Know: Mozingo v. Pitt County Memorial Hospital," see 28 Wake Forest L. Rev. 747 (1993).

For note, "The Evolution and Status of the Contributory Negligence Defense to Medical Malpractice Actions in North Carolina — McGill v. French," 16 Campbell L. Rev. 103 (1994).

CASE NOTES

Applied in Bailey v. Jones, 112 N.C. App. 380, 435 S.E.2d 787 (1993).

Stated in Reich v. Price, 110 N.C. App. 255, 429 S.E.2d 372 (1993).

§ 90-21.13. Informed consent to health care treatment or procedure.

CASE NOTES

Expert Testimony Required to Establish the Standard of Care. — The standard of care required of a health care provider in a particular case generally concerns specialized knowledge and is thus unfamiliar to most laypersons. Consequently, our courts have consistently held that in the usual medical malpractice or medical negligence case, testimony of a qualified expert is required to establish the standard of care. Clark v. Perry, 114 N.C. App. 297, 442 S.E.2d 57 (1994).

Informed Consent and Expert Testimony. — Regarding actions based upon a health care provider's failure to obtain informed consent, subsection (a)(1) requires the use of expert medical testimony by the party seeking to establish the standard of care. Clark v. Perry, 114 N.C. App. 297, 442 S.E.2d 57 (1994).

Hospital's Standard of Care Required. — Plaintiff's failure to present prima facie evidence of the standard of care applicable to hospital in obtaining plaintiff's informed consent to undergo a blood transfusion was fatal to claim against defendant hospital. Clark v. Perry, 114 N.C. App. 297, 442 S.E.2d 57 (1994).

Stated in Crawford v. Fayez, 112 N.C. App. 328, 435 S.E.2d 545 (1993).

ARTICLE 2.

Dentistry.

§ 90-27. (Effective October 1, 1994 — See editor's note) Judicial powers; additional data for records.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-29. Necessity for license; dentistry defined; exemptions.

CASE NOTES

Cited in State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

§ 90-29.2. (See editor's note for date change) Requirements in respect to written work orders; penalty.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-40. (Effective October 1, 1994 — See editor's note) Unauthorized practice; penalty.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-41. Disciplinary action.

CASE NOTES

Dentist's administering of nitrous oxide sedation to a female patient while no one else was present in the office constituted negligence in the practice of dentistry. McCollough v. North Carolina State Bd. of Dental Exmrs., 111 N.C. App. 186, 431 S.E.2d 816, cert. denied, 335 N.C. 174, 436 S.E.2d 381 (1993).

§ 90-48. (Effective October 1, 1994 — See editor's note) Rules and regulations of Board; violation a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 4A.

North Carolina Pharmacy Practice Act.

§ 90-85.3. Definitions.

(a) "Administer" means the direct application of a drug to the body of a patient by injection, inhalation, ingestion or other means.

(b) "Board" means the North Carolina Board of Pharmacy.

(c) "Compounding" means taking two or more ingredients and combining them into a dosage form of a drug, exclusive of compounding by a drug manufacturer, distributor, or packer.

(d) "Deliver" means the actual, constructive or attempted transfer of a drug, a device, or medical equipment from one person to another.

(e) "Device" means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent or other similar or related article including any component part or accessory, whose label or labeling bears the statement "Caution: federal law requires dispensing by or on the order of a physician." The term does not include:

(1) Devices used in the normal course of treating patients by health care facilities and agencies licensed under Chapter 131E or Article 2 of Chapter 122C of the General Statutes;
(2) Devices used or provided in the treatment of patients by medical doctors, dentists, physical therapists, occupational therapists, speech pathologists, optometrists, chiropractors, podiatrists, and nurses licensed under Chapter 90 of the General Statutes, provided they do not dispense devices used to administer or dispense drugs.

(f) "Dispense" means preparing and packaging a prescription drug or device in a container and labeling the container with information required by State and federal law. Filling or refilling drug containers with prescription drugs for subsequent use by a patient is "dispensing". Providing quantities of unit dose prescription drugs for subsequent administration is "dispensing".

(g) "Drug" means:
(1) Any article recognized as a drug in the United States Pharmacopeia, or in any other drug compendium or any supplement thereto, or an article recognized as a drug by the United States Food and Drug Administration;
(2) Any article, other than food or devices, intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals;
(3) Any article, other than food or devices, intended to affect the structure or any function of the body of man or other animals; and
(4) Any article intended for use as a component of any articles specified in clause (1), (2) or (3) of this subsection.

(h) "Emancipated minor" means any person under the age of 18 who is or has been married or who is or has been a parent; or whose parents or guardians have surrendered their rights to the minor's services and earnings as well as their right to custody and control of the minor's person; or who has been emancipated by an appropriate court order.

(i) "Health care provider" means any licensed health care professional; any agent or employee of any health care institution, health care insurer, health care professional school; or a member of any allied health profession.

(j) "Label" means a display of written, printed or graphic matter upon the immediate or outside container of any drug.

(k) "Labeling" means preparing and affixing a label to any drug container, exclusive of labeling by a manufacturer, packer or distributor of a nonprescription drug or a commercially packaged prescription drug or device.

(*l*) "License" means a license to practice pharmacy including a renewal license issued by the Board.

(*l*1) "Medical equipment" means any of the following items that are intended for use by the consumer in the consumer's place of residence:
(1) A device.
(2) Ambulation assistance equipment.
(3) Mobility equipment.
(4) Rehabilitation seating.
(5) Oxygen and respiratory care equipment.
(6) Rehabilitation environmental control equipment.
(7) Diagnostic equipment.

(8) A bed prescribed by a physician to treat or alleviate a medical condition.

The term "medical equipment" does not include (i) medical equipment used or dispensed in the normal course of treating patients by or on behalf of home care agencies, hospitals, and nursing facilities licensed under Chapter 131E of the General Statutes or hospitals or agencies licensed under Article 2 of Chapter 122C of the General Statutes; (ii) medical equipment used or dispensed by professionals licensed under Chapters 90 or 93D of the General Statutes, provided the professional is practicing within the scope of that professional's practice act; (iii) upper and lower extremity prosthetics and related orthotics; or (iv) canes, crutches, walkers, and bathtub grab bars.

(m) "Permit" means a permit to operate a pharmacy, deliver medical equipment, or dispense devices, including a renewal license issued by the Board.

(n) "Person" means an individual, corporation, partnership, association, unit of government, or other legal entity.

(o) "Person in loco parentis" means the person who has assumed parental responsibilities for a child.

(p) "Pharmacist" means a person licensed under this Article to practice pharmacy.

(q) "Pharmacy" means any place where prescription drugs are dispensed or compounded.

(r) "Practice of pharmacy" means the responsibility for: interpreting and evaluating drug orders, including prescription orders; compounding, dispensing and labeling prescription drugs and devices; properly and safely storing drugs and devices; maintaining proper records; and controlling pharmacy goods and services. A pharmacist may advise and educate patients and health care providers concerning therapeutic values, content, uses and significant problems of drugs and devices; assess, record and report adverse drug and device reactions; take and record patient histories relating to drug and device therapy; monitor, record and report drug therapy and device usage; perform drug utilization reviews; and participate in drug and drug source selection and device and device source selection as provided in G.S. 90-85.27 through G.S. 90-85.31. A pharmacist who has received special training may be authorized and permitted to administer drugs pursuant to a specific prescription order in accordance with rules and regulations adopted by each of the Boards of Pharmacy, the Board of Nursing, and the Board of Medical Examiners of the State of North Carolina. Such rules and regulations shall be designed to ensure the safety and health of the patients for whom such drugs are administered.

(s) "Prescription drug" means a drug that under federal law is required, prior to being dispensed or delivered, to be labeled with the following statement:

"Caution: Federal law prohibits dispensing without prescription."

(t) "Prescription order" means a written or verbal order for a prescription drug, prescription device, or pharmaceutical service from a person authorized by law to prescribe such drug, device, or service. A prescription order includes an order entered in a chart or other medical record of a patient.

(u) "Unit dose medication system" means a system in which each dose of medication is individually packaged in a properly sealed and properly labeled container. (1981 (Reg. Sess., 1982), c. 1188, s.

1; 1983, c. 196, ss. 1-3; 1991, c. 578, s. 1; 1993 (Reg. Sess., 1994), c. 692, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "drug, a device, or medical equipment" for "drug or device" in subsection (d); added subsection (*l*1); and inserted "deliver medical equipment" in subsection (m).

§ 90-85.22. Device and medical equipment permits.

(a) Devices. — Each place where devices are dispensed shall register annually with the Board on a form provided by the Board and obtain a device permit. A business that has a current pharmacy permit does not have to register and obtain a device permit. Records of devices dispensed in pharmacies or other places shall be kept in accordance with rules adopted by the Board.

(b) Medical Equipment. — Each place that delivers medical equipment to the user of the equipment shall register annually with the Board on a form provided by the Board and obtain a medical equipment permit. A business that has a current pharmacy permit or a current device permit does not have to register and obtain a medical equipment permit. Medical equipment shall be delivered only in accordance with requirements established by rules adopted by the Board. (1981 (Reg. Sess., 1982), c. 1188, s. 1; 1993 (Reg. Sess., 1994), c. 692, s. 1.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "Device and medical equipment permits" for "Devices; registration" as the catchline of this section; added the subsection (a) designation and rewrote subsection (a); and added subsection (b).

§ 90-85.24. Fees collectible by Board.

The Board of Pharmacy shall be entitled to charge and collect not more than the following fees: for the examination of an applicant for license as a pharmacist, one hundred fifty dollars ($150.00) plus the cost of the test material; for renewing the license as a pharmacist, sixty-five dollars ($65.00); for renewing the license of an assistant pharmacist, ten dollars ($10.00); for licenses without examination as provided in G.S. 90-85.20, original, three hundred dollars ($300.00); for original registration of a drugstore, two hundred fifty dollars ($250.00), and renewal thereof, one hundred twenty-five dollars ($125.00); for registration to dispense devices, deliver medical equipment, or both, three hundred dollars ($300.00) per year. All fees shall be paid before any applicant may be admitted to examination or the applicant's name may be placed upon the register of pharmacists or before any license or permit, or any renewal thereof, may be issued by the Board. (1905, c. 108, s. 12; Rev., s. 4478; C.S., s. 6657; 1921, c. 57, s. 3; 1945, c. 572, s. 3; 1953, c. 183, s. 1; 1965, c. 676, s. 1; 1973, c. 1183; 1981, c. 72; c. 717, s. 3; 1981 (Reg. Sess., 1982), c. 1188, s. 2; 1983, c. 196, s. 8; 1987, c. 260; 1987 (Reg. Sess., 1988), c. 1039, s. 4; 1993 (Reg. Sess., 1994), c. 692, s. 3.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, inserted "for registration to dispense devices, deliver medical equipment, or both, three hundred dollars ($300.00) per year" in the first sentence, and substituted "the applicant's name may be" for "his name" in the second sentence.

§ 90-85.40. Violations.

(a) It shall be unlawful for any owner or manager of a pharmacy or other place to allow or cause anyone other than a pharmacist to dispense or compound any prescription drug except as an aide to and under supervision of a pharmacist.

(b) Every person lawfully authorized to compound or dispense prescription drugs shall comply with all the laws and regulations governing the labeling and packaging of such drugs by pharmacists.

(c) It shall be unlawful for any person not licensed as a pharmacist to compound or dispense any prescription drug, except as an aide to and under the supervision of a pharmacist.

(d) It shall be unlawful for any person to manage any place of business where devices are dispensed or sold at retail without a permit as required by this Article.

(d1) It is unlawful for a person to own or manage a place of business from which medical equipment is delivered without a permit as required by this Article.

(e) It shall be unlawful for any person without legal authorization to dispose of an article that has been embargoed under this Article.

(f) It shall be unlawful to violate any provision of this Article or of any rules or regulations enacted pursuant to it.

(g) This Article shall not be construed to prohibit any person from performing an act that person is authorized to perform pursuant to North Carolina law. Health care providers who are authorized to prescribe drugs without supervision are authorized to dispense drugs without supervision.

(h) **(Effective October 1, 1994 — See editor's note)** A violation of this Article shall be a Class 1 misdemeanor. (1905, c. 108, ss. 4, 23, 24; Rev., ss. 3649, 3650, 4487; C.S., ss. 6667, 6668, 6669; 1921, c. 68, ss. 6, 7; Ex. Sess. 1924, c. 116; 1953, c. 1051; 1957, c. 617; 1959, c. 1222; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1993, c. 539, s. 621; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 692, s. 4.)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, added subsection (d1).

ARTICLE 5.

North Carolina Controlled Substances Act.

§ 90-86. Title of Article.

CASE NOTES

Cited in State v. McRae, 110 N.C. App. 643, 430 S.E.2d 434 (1993).

§ 90-87. Definitions.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Stated in State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477 (1994).

§ 90-89. Schedule I controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a high potential for abuse, no currently accepted medical use in the United States, or a lack of accepted safety for use in treatment under medical supervision. The following controlled substances are included in this schedule:

(a) Any of the following opiates, including the isomers, esters, ethers, salts and salts of isomers, esters, and ethers, unless specifically excepted, or listed in another schedule, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

01. Acetyl-alpha-methylfentanyl (N[1-(1-methyl-2-phenethyl)-4-piperidinyl]-N-phenylacetamide).
1. Acetylmethadol.
1a. Repealed by Session Laws 1987, c. 412, s. 2.
1b. Alpha-methylthiofentanyl (N-[1-methyl-2-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide).
2. Allylprodine.
3. Alphacetylmethadol.
4. Alphameprodine.
5. Alphamethadol.
5a. Alpha-methylfentanyl (N-(1-(alpha-methyl-beta-phenyl) ethyl-4-piperidyl) propionalilide; 1(1-methyl-2-phenylethyl)-4-(N-propanilido) piperidine).
6. Benzethidine.
7. Betacetylmethadol.
7a. Beta-hydroxfentanyl (N-[1-(2-hydroxy-2-phenethyl)-4-piperidinyl]-N-phenylpropanamide).

7b. Beta-hydroxy-3-methylfentanyl (N-[1-(2-hydroxy-2-phenethyl)-3-methyl-4-piperidinyl]-N-phenylpropanamide).
8. Betameprodine.
9. Betamethadol.
10. Betaprodine.
11. Clonitazene.
12. Dextromoramide.
13. Diampromide.
14. Diethylthiambutene.
15. Difenoxin.
16. Dimenoxadol.
17. Dimepheptanol.
18. Dimethylthiambutene.
19. Dioxaphetyl butyrate.
20. Dipipanone.
21. Ethylmethylthiambutene.
22. Etonitazene.
23. Etoxeridine.
24. Furethidine.
25. Hydroxypethidine.
26. Ketobemidone.
27. Levomoramide.
28. Levophenacylmorphan.
28a. 1-methyl-4-phenyl-4-propionoxypiperidine (MPPP).
28b. 3-Methylfentanyl (N-[3-methyl-1-(2-Phenylethyl)-4-Piperidyl]-N-Phenylpropanamide).
28c. 3-Methylthiofentanyl (N-[(3-methyl-1-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide).
29. Morpheridine.
30. Noracymethadol.
31. Norlevorphanol.
32. Normethadone.
33. Norpipanone.
33a. Para-fluorofentanyl (N-(4-fluorophenyl)-N-[1-(2-phen ethyl)-4-piperidinyl]-propanamide.
34. Phenadoxone.
35. Phenampromide.
35a. 1-(2-phenethyl)-4-phenyl-4-acetoxypiperidine (PEPAP).
36. Phenomorphan.
37. Phenoperidine.
38. Piritramide.
39. Proheptazine.
40. Properidine.
41. Propiram.
42. Racemoramide.
42a. Thiofentanyl (N-phenyl-N-[1-(2-thienyl)ethyl-4-piperidinyl]-propanamide.
42b. Tilidine.
43. Trimeperidine.

(b) Any of the following opium derivatives, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. Acetorphine.
2. Acetyldihydrocodeine.

3. Benzylmorphine.
4. Codeine methylbromide.
5. Codeine-N-Oxide.
6. Cyprenorphine.
7. Desomorphine.
8. Dihydromorphine.
9. Etorphine (except hydrochloride salt).
10. Heroin.
11. Hydromorphinol.
12. Methyldesorphine.
13. Methyldihydromorphine.
14. Morphine methylbromide.
15. Morphine methylsulfonate.
16. Morphine-N-Oxide.
17. Myrophine.
18. Nicocodeine.
19. Nicomorphine.
20. Normorphine.
21. Pholcodine.
22. Thebacon.
23. Drotebanol.

(c) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. 3, 4-methylenedioxyamphetamine.
2. 5-methoxy-3, 4-methylenedioxyamphetamine.
2a. 3, 4-Methylenedioxymethamphetamine (MDMA).
2b. 3,4-methylenedioxy-N-ethylamphetamine (also known as N-ethyl-alpha-methyl-3,4-(methylenedioxy)phenethylamine, N-ethyl MDA, MDE, and MDEA).
2c. N-hydroxy-3,4-methylenedioxyamphetamine (also known as N-hydroxy-alpha-methyl-3,4-(methylenedioxy)phenethylamine, and N-hydroxy MDA).
3. 3, 4, 5-trimethoxyamphetamine.
4. Bufotenine.
5. Diethyltryptamine.
6. Dimethyltryptamine.
7. 4-methyl-2, 5-dimethoxyamphetamine.
8. Ibogaine.
9. Lysergic acid diethylamide.
10. Mescaline.
11. Peyote, meaning all parts of the plant presently classified botanically as Lophophora Williamsii Lemaire, whether growing or not; the seeds thereof; any extract from any part of such plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seed or extracts.
12. N-ethyl-3-piperidyl benzilate.
13. N-methyl-3-piperidyl benzilate.
14. Psilocybin.
15. Psilocyn.
16. 2, 5-dimethoxyamphetamine.

16a. 2, 5-dimethoxy-4-ethylamphetamine. Some trade or other names: DOET.
17. 4-bromo-2, 5-dimethoxyamphetamine.
18. 4-methoxyamphetamine.
19. Ethylamine analog of phencyclidine. Some trade or other names: N-ethyl-1-phenylcyclohexylamine, (1-phenylcyclohexyl) ethylamine, N-(1-phenylcyclohexyl) ethylamine, cyclohexamine, PCE.
20. Pyrrolidine analog of phencyclidine. Some trade or other names: 1-(1-phenylcyclohexyl)-pyrrolidine, PCPy, PHP.
21. Thiophene analog of phencyclidine. Some trade or other names: 1-[1-(2-thienyl)-cyclohexyl]-piperidine, 2-thienyl analog of phencyclidine, TPCP, TCP.
21a. 1-[1-(2-thienyl)cyclohexyl]pyrrolidine; Some other names: TCPy.
22. Parahexyl.

(d) Any material compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, unless specifically excepted or unless listed in another schedule:

1. Mecloqualone.
2. Methaqualone.

(e) Stimulants. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation that contains any quantity of the following substances having as stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers:

01. Cathinone. Some trade or other names: 2-amino-1-phenyl-1-propanone, alpha-aminopropiophenone, 2-aminopropiophenone, and norephedrone.
1. Fenethylline.
1a. (+/-)cis-4-methylaminorex [(+/-)cis-4,5-dihydro-4-methyl-5-phenyl-2-oxazolamine] (also known as 2-amino-4-methyl-5-phenyl-2-oxazoline).
1b. N,N-dimethylamphetamine [Some other names: N,N,alpha-trimethylbenzeneethaneamine; N,N,alpha-trimethylphenethylamine].
2. N-ethylamphetamine. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 844; c. 1358, ss. 4, 5, 15; 1975, c. 443, s. 1; c. 790; 1977, c. 667, s. 3; c. 891, s. 1; 1979, c. 434, s. 1; 1981, c. 51, s. 9; 1983, c. 695, s. 1; 1985, c. 172, ss. 1-3; 1987, c. 412, ss. 1-5; 1989 (Reg. Sess., 1990), c. 1040, s. 1; 1993, c. 319, ss. 1, 2.)

Editor's Note. — This section has been set out to correct a printing error in the main pamphlet.

§ 90-90. Schedule II controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a high potential for abuse; currently accepted medical use in the United States, or currently accepted medical use with severe restrictions; and the abuse of the substance may lead to severe psychic or physical dependence. The following controlled substances are included in this schedule:

(a) Any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, unless specifically excepted or unless listed in another schedule:

1. Opium and opiate, and any salt, compound, derivative, or preparation of opium and opiate, excluding apomorphine, thebaine derived butorphanol, nalbuphine, dextrorphan, naloxone, naltrexone and nalmefene, and their respective salts, but including the following:
   (i) Raw opium.
   (ii) Opium extracts.
   (iii) Opium fluid extracts.
   (iv) Powdered opium.
   (v) Granulated opium.
   (vi) Tincture of opium.
   (vii) Codeine.
   (viii) Ethylmorphine.
   (ix) Etorphine hydrochloride.
   (x) Hydrocodone.
   (xi) Hydromorphone.
   (xii) Metopon.
   (xiii) Morphine.
   (xiv) Oxycodone.
   (xv) Oxymorphone.
   (xvi) Thebaine.
2. Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph 1 of this subdivision, except that these substances shall not include the isoquinoline alkaloids of opium.
3. Opium poppy and poppy straw.
4. Cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocanized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.
5. Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid or powder form which contains the phenanthrine alkaloids of the opium poppy).

(b) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation unless specifically exempted or listed in other schedules:

01. Alfentanil.
1. Alphaprodine.
2. Anileridine.
3. Bezitramide.
3a. Carfentanil.
4. Dihydrocodeine.
5. Diphenoxylate.
6. Fentanyl.
7. Isomethadone.
8. Levomethorphan.
9. Levorphanol.
10. Metazocine.
11. Methadone.
12. Methadone — Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane.
13. Moramide — Intermediate, 2-methyl-3-morpholino-1, 1-diphenyl-propane-carboxylic acid.
14. Pethidine.
15. Pethidine — Intermediate — A, 4-cyano-1-methyl-4-phenylpiperidine.
16. Pethidine — Intermediate — B, ethyl-4-phenylpiperidine-4-carboxylate.
17. Pethidine — Intermediate — C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.
18. Phenazocine.
19. Piminodine.
20. Racemethorphan.
21. Racemorphan.
22. Sufentanil.

(c) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system unless specifically exempted or listed in another schedule:

1. Amphetamine, its salts, optical isomers, and salts of its optical isomers.
2. Phenmetrazine and its salts.
3. Methamphetamine, including its salts, isomers, and salts of isomers.
4. Methylphenidate.
5. Phenylacetone. Some trade or other names: Phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone.

(d) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, unless specifically exempted by the Commission or listed in another schedule:

1. Amobarbital
1a. Glutethimide
2. Repealed by Session Laws 1983, c. 695, s. 2.

3. Pentobarbital
4. Phencyclidine
5. Phencyclidine immediate precursors:
   a. 1-Phenylcyclohexylamine
   b. 1-Piperidinocyclohexanecarbonitrile (PCC)
6. Secobarbital.

(e) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved drug product. [Some other names:(6aR-trans)-6a,7,8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-6H-dibenzo[b,d] pyra n-1-o1, or (-)-delta-9-(trans)-tetrahydrocannabinol].
2. Nabilone [Another name for nabilone: (+/-)-trans-3-(1,1-dimethylheptyl)-6,6a,7,8,10,10a-hexahydro-1-hydroxy-6,6-dimethyl-9H-dibenzo[b,d]pyran-9-one]. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, s. 6; c. 1358, ss. 6, 15; 1975, c. 443, s. 2; 1977, c. 667, s. 3; c. 891, s. 2; 1979, c. 434, s. 2; 1981, c. 51, s. 9; 1983, c. 695, s. 2; 1985, c. 172, ss. 4, 5; 1987, c. 105, s. 3; c. 412, ss. 5A-7; 1989 (Reg. Sess., 1990), c. 1040, s. 2; 1993, c. 319, ss. 3, 4.)

Editor's Note. — This section has been set out to correct a printing error in the main pamphlet.

§ 90-95. (Effective October 1, 1994 — See editor's note) Violations; penalties.

(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;

(2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;

(3) To possess a controlled substance.

(b) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(1) with respect to:

(1) A controlled substance classified in Schedule I or II shall be punished as a Class H felon;

(2) A controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class I felon, but the transfer of less than 5 grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1).

(c) Any person who violates G.S. 90-95(a)(2) shall be punished as a Class I felon.

(d) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(3) with respect to:

(1) A controlled substance classified in Schedule I shall be punished as a Class I felon;

(2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a Class 1 misdemeanor. If the controlled substance exceeds four tablets, capsules, or other dosage units or equivalent quantity of hydromorphone or if the quantity of the controlled substance, or combination of the controlled substances, exceeds one hundred tablets, capsules or other dosage units, or equivalent quantity, the violation shall be punishable as a Class I felony. If the controlled substance is phencyclidine, or cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocanized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine), the violation shall be punishable as a Class I felony.

(3) A controlled substance classified in Schedule V shall be guilty of a Class 2 misdemeanor;

(4) A controlled substance classified in Schedule VI shall be guilty of a Class 3 misdemeanor, but any sentence of imprisonment imposed must be suspended and the judge may not require at the time of sentencing that the defendant serve a period of imprisonment as a special condition of probation. If the quantity of the controlled substance exceeds one-half of an ounce (avoirdupois) of marijuana or one-twentieth of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, the violation shall be punishable as a Class 1 misdemeanor. If the quantity of the controlled substance exceeds one and one-half ounces (avoirdupois) of marijuana or three-twentieths of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, or if the controlled substance consists of any quantity of synthetic tetrahydrocannabinols or tetrahydrocannabinols isolated from the resin of marijuana, the violation shall be punishable as a Class I felony.

(d1) Except as authorized by this Article, it is unlawful for any person to:

(1) Possess an immediate precursor chemical with intent to manufacture a controlled substance; or

(2) Possess or distribute an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture a controlled substance.

Any person who violates this subsection shall be punished as a Class H felon.

(d2) The immediate precursor chemicals to which subsection (d1) of this section applies are those immediate precursor chemicals designated by the Commission pursuant to its authority under G.S. 90-88, and the following (until otherwise specified by the Commission):

(1) Anthranilic acid.

(2) Benzyl cyanide.

(3) Chloroephedrine.

(4) Chloropseudoephedrine.
(5) D-lysergic acid.
(6) Ephedrine.
(7) Ergonovine maleate.
(8) Ergotamine tartrate.
(9) Ethyl Malonate.
(10) Ethylamine.
(11) Isosafrole.
(12) Malonic acid.
(13) Methylamine.
(14) N-acetylanthranilic acid.
(15) N-ethylephedrine.
(16) N-ethylepseudoephedrine.
(17) N-methylephedrine.
(18) N-methylpseudoephedrine.
(19) Norpseudoephedrine.
(20) Phenyl-2-propane.
(21) Phenylacetic acid.
(22) Phenylpropanolamine.
(23) Piperidine.
(24) Piperonal.
(25) Propionic anhydride.
(26) Pseudoephedrine.
(27) Pyrrolidine.
(28) Safrole.
(29) Thionylchloride.

(e) The prescribed punishment and degree of any offense under this Article shall be subject to the following conditions, but the punishment for an offense may be increased only by the maximum authorized under any one of the applicable conditions:

(1), (2) Repealed by Session Laws 1979, c. 760, s. 5.

(3) If any person commits a Class 1 misdemeanor under this Article and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be punished as a Class I felon. The prior conviction used to raise the current offense to a Class I felony shall not be used to calculate the prior record level;

(4) If any person commits a Class 2 misdemeanor, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a Class 1 misdemeanor. The prior conviction used to raise the current offense to a Class 1 misdemeanor shall not be used to calculate the prior conviction level;

(5) Any person 18 years of age or over who violates G.S. 90-95(a)(1) by selling or delivering a controlled substance to a person under 16 years of age or a pregnant female shall be punished as a Class E felon. Mistake of age is not a defense to a prosecution under this section. It shall not be a defense that the defendant did not know that the recipient was pregnant;

(6) For the purpose of increasing punishment under G.S. 90-95(e)(3) and (e)(4), previous convictions for offenses

shall be counted by the number of separate trials at which final convictions were obtained and not by the number of charges at a single trial;

(7) If any person commits an offense under this Article for which the prescribed punishment requires that any sentence of imprisonment be suspended, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a Class 2 misdemeanor;

(8) Any person 21 years of age or older who commits an offense under G.S. 90-95(a)(1) on property used for an elementary or secondary school or within 300 feet of the boundary of real property used for an elementary or secondary school shall be punished as a Class E felon. For purposes of this subdivision, the transfer of less than five grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1).

(9) Any person who violates G.S. 90-95(a)(3) on the premises of a penal institution or local confinement facility shall be guilty of a Class I felony.

(f) Any person convicted of an offense or offenses under this Article who is sentenced to an active term of imprisonment that is less than the maximum active term that could have been imposed may, in addition, be sentenced to a term of special probation. Except as indicated in this subsection, the administration of special probation shall be the same as probation. The conditions of special probation shall be fixed in the same manner as probation, and the conditions may include requirements for rehabilitation treatment. Special probation shall follow the active sentence. No term of special probation shall exceed five years. Special probation may be revoked in the same manner as probation; upon revocation, the original term of imprisonment may be increased by no more than the difference between the active term of imprisonment actually served and the maximum active term that could have been imposed at trial for the offense or offenses for which the person was convicted, and the resulting term of imprisonment need not be diminished by the time spent on special probation.

(g) Whenever matter is submitted to the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory or to the Toxicology Laboratory, Reynolds Health Center, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication in all proceedings in the district court division of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed.

(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 50 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:

a. Is in excess of 50 pounds, but less than 100 pounds, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 30 months in the State's prison and shall be fined not less than five thousand dollars ($5,000);

b. Is 100 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or any coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, and any salt, isomer, salts of isomers, compound,

derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(3a) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of amphetamine, its salts, optical isomers, and salts of its optical isomers or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in amphetamine" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3b) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine shall be guilty of a felony which felony shall be known as "trafficking in methamphetamine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of 117 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

(4a) Any person who sells, manufactures, delivers, transports, or possesses 100 tablets, capsules, or other dosage units, or the equivalent quantity, or more, of Lysergic Acid Diethylamide, or any mixture containing such substance, shall be guilty of a felony, which felony shall be known as "trafficking in Lysergic Acid Diethylamide". If the quantity of such substance or mixture involved:

a. Is 100 or more dosage units, or equivalent quantity, but less than 500 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more dosage units, or equivalent quantity, but less than 1,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(5) Except as provided in this subdivision, a person being sentenced under this subsection may not receive a suspended sentence or be placed on probation. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

(i) The penalties provided in subsection (h) of this section shall also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section. (1971, c. 919, s. 1; 1973, c. 654, s. 1; c. 1078; c. 1358, s. 10; 1975, c. 360, s. 2; 1977, c. 862, ss. 1, 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1251, ss. 4-7; 1983, c. 18; c. 294, s. 6; c. 414; 1985, c. 569, s. 1; c. 675, ss. 1, 2; 1987, c. 90; c. 105, ss. 4, 5; c. 640, ss. 1, 2; c. 783, s. 4; 1989, c. 641; c. 672; c. 690; c. 770, s. 68; 1989 (Reg. Sess., 1990), c. 1024, s. 17; c. 1039, s. 5; c. 1081, s. 2; 1991, c. 484, s. 1; 1993, c. 538, s. 30; c. 539, s. 1358.1; 1994, Ex. Sess., c. 11, s. 1; c. 14, ss. 46, 47; c. 24, s. 14(b).)

Editor's Note. —

Session Laws 1993, c. 538, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. —

Session Laws 1994, Extra Session, c. 11, s. 1, effective May 1, 1994, repealed Session Laws 1993, c. 539, s. 1358.1, as amended by Session Laws 1994, Extra

Session, c. 24, s. 14(c), which would have amended subdivision (d)(2) of this section effective October 1, 1994, by substituting "one gram or more" for "phencyclidine, or" in the third sentence and adding a final sentence relating to phencyclidine.

Session Laws 1994, Extra Session, c. 14, ss. 46 and 47, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "decocainized" for "decocanized" in subdivision (h)(3); and substituted "117 months" for "120 months" in subdivision (h)(4)b.

CASE NOTES

I. General Consideration.
IV. Possession.
  A. In General.
V. Trafficking.

I. GENERAL CONSIDERATION.

Weight of Marijuana. — The state, in order to prove the element of weight of the marijuana in question, must either offer evidence of its actual, measured weight or demonstrate that the quantity of marijuana itself is so large as to permit a reasonable inference that its weight satisfied this element. State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994).

Unlike age, the weight of a given quantity of marijuana is not a matter of general knowledge and experience. This is a matter familiar only to those who regularly use or deal in the substance, who are engaged in enforcing the laws against it, or who have developed an acute ability to assess the weight of objects down to the ounce and the average juror does not fall into any of these categories. State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994).

Drug Purchases Within 300 Feet of School. —

There was plenary evidence that the drug sale, for which defendant was charged, took place within 300 feet of a school boundary in violation of subdivision (e)(8). State v. Alston, 111 N.C. App. 416, 432 S.E.2d 385 (1993).

Applied in State v. Williamson, 110 N.C. App. 626, 430 S.E.2d 467 (1993); State v. Baker, 112 N.C. App. 410, 435 S.E.2d 812 (1993).

Stated in State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477 (1994).

Cited in State v. Farris, 111 N.C. App. 254, 431 S.E.2d 803 (1993); State v. Beveridge, 112 N.C. App. 688, 436 S.E.2d 912 (1993); United States v. D'Anjou, 16 F.3d 604 (4th Cir. 1994); State v. McEachern, 114 N.C. App. 218, 441 S.E.2d 574 (1994).

IV. POSSESSION.

A. In General.

Constructive Possession in Vehicle. — If a defendant possesses a controlled substance while in a vehicle, he is guilty at least of possession of a controlled substance. If a vehicle contains a controlled substance but the defendant is not in the vehicle, he may be guilty of possession of a controlled substance by operation of the doctrine of constructive possession. State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994).

V. TRAFFICKING.

Trafficking by possession, etc. —

Sale, manufacture, delivery, transportation, and possession of 28 grams or more of cocaine as defined under subdivision (h)(3) are separate trafficking offenses for which a defendant may be separately convicted and punished. State v. Garcia, 111 N.C. App. 636, 433 S.E.2d 187 (1993).

"Substantial" Movement Shown. — Where defendant removed drugs from a dwelling house and carried them to a car which he used to leave the premises, such movement was "substantial" and sufficient to sustain the charge of trafficking by transporting in violation of subdivision (h)(3) of this section. Durham Herald Co. v. North Carolina Low-Level Radioactive Waste Mgt. Auth., 110 N.C. App. 607, 430 S.E.2d 441, cert. denied, 334 N.C. 625, 435 S.E.2d 347 (1993).

Evidence held sufficient, etc. —

Evidence was sufficient to support finding as an aggravating factor that defendant induced others to participate in the trafficking of cocaine. State v.

Smallwood, 112 N.C. App. 76, 434 S.E.2d 615 (1993).

§ 90-96. Conditional discharge and expunction of records for first offense.

(a) Whenever any person who has not previously been convicted of any offense under this Article or under any statute of the United States or any state relating to those substances included in Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or is found guilty of (i) a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article or by possessing drug paraphernalia as prohibited by G.S. 90-113.21, or (ii) a felony under G.S. 90-95(a)(3) by possessing less than one gram of cocaine, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require. Notwithstanding the provisions of G.S. 15A-1342(c) or any other statute or law, probation may be imposed under this section for an offense under this Article for which the prescribed punishment includes only a fine. To fulfill the terms and conditions of probation the court may allow the defendant to participate in a drug education program approved for this purpose by the Department of Human Resources. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions under this Article. Discharge and dismissal under this section or G.S. 90-113.14 may occur only once with respect to any person. Disposition of a case to determine discharge and dismissal under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal. Prior to taking any action to discharge and dismiss under this section the court shall make a finding that the defendant has no record of previous convictions under the "North Carolina Controlled Substances Act", Article 5, Chapter 90, the "North Carolina Toxic Vapors Act", Article 5A, Chapter 90, or the "Drug Paraphernalia Act", Article 5B, Chapter 90.

(a1) Upon the first conviction only of any offense included in G.S. 90-95(a)(3) or G.S. 90-113.21 and subject to the provisions of this subsection (a1), the court may place defendant on probation under this section for an offense under this Article including an offense for which the prescribed punishment includes only a fine. The probation, if imposed, shall be for not less than one year and shall contain a minimum condition that the defendant who was found guilty or pleads guilty enroll in and successfully complete, within 150 days of the date of the imposition of said probation, the program of instruction at the drug education school approved by the Department of Human Resources pursuant to G.S. 90-96.01. The court may impose probation that does not contain a condition that defendant successfully complete the program of instruction at a drug education school if:

(1) There is no drug education school within a reasonable distance of the defendant's residence; or

(2) There are specific, extenuating circumstances which make it likely that defendant will not benefit from the program of instruction.

The court shall enter such specific findings in the record; provided that in the case of subdivision (2) above, such findings shall include the specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction.

For the purposes of determining whether the conviction is a first conviction or whether a person has already had discharge and dismissal, no prior offense occurring more than seven years before the date of the current offense shall be considered. In addition, convictions for violations of a provision of G.S. 90-95(a)(1) or 90-95(a)(2) or 90-95(a)(3), or 90-113.10, or 90-113.11, or 90-113.12, or 90-113.21 shall be considered previous convictions.

Failure to complete successfully an approved program of instruction at a drug education school shall constitute grounds to revoke probation and deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. For purposes of this subsection, the phrase "failure to complete successfully the prescribed program of instruction at a drug education school" includes failure to attend scheduled classes without a valid excuse, failure to complete the course within 150 days of imposition of probation, willful failure to pay the required fee for the course, or any other manner in which the person fails to complete the course successfully. The instructor of the course to which a person is assigned shall report any failure of a person to complete successfully the program of instruction to the court which imposed probation. Upon receipt of the instructor's report that the person failed to complete the program successfully, the court shall revoke probation and/or deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. A person may obtain a hearing before the court of original jurisdiction prior to revocation of probation or denial of application for expunction.

This subsection is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina.

(b) Upon the dismissal of such person, and discharge of the proceedings against him under subsection (a) of this section, such person, if he were not over 21 years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. The applicant shall attach to the application the following:

(1) An affidavit by the applicant that he has been of good behavior during the period of probation since the decision to defer further proceedings on the offense in question and has not been convicted of any felony, or misdemeanor,

other than a traffic violation, under the laws of the United States or the laws of this State or any other state;

(2) Verified affidavits by two persons who are not related to the applicant or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives, and that his character and reputation are good;

(3) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted, and, if different, the county of which the petitioner is a resident, showing that the applicant has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the offense in question or during the period of probation following the decision to defer further proceedings on the offense in question.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the probationary period deemed desirable.

If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over 21 years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person in the contemplation of the law to the status he occupied before such arrest or indictment or information. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

The court shall also order that said conviction and the records relating thereto be expunged from the records of the court, and direct all law-enforcement agencies bearing records of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police or other arresting agency, as appropriate, and the sheriff, chief of police or other arresting agency, as appropriate, shall forward such order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

(c) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons granted a conditional discharge under the provisions of this Article, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in the file shall be disclosed only to Judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under this Article has been previously granted a conditional discharge.

(d) Whenever any person is charged with a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article or a felony under G.S.

90-95(a)(3) by possessing less than one gram of cocaine, upon dismissal by the State of the charges against him, upon entry of a nolle prosequi, or upon a finding of not guilty or other adjudication of innocence, such person may apply to the court for an order to expunge from all official records all recordation relating to his arrest, indictment or information, or trial. If the court determines, after hearing that such person was not over 21 years of age at the time any of the proceedings against him occurred, it shall enter such order. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

(e) Whenever any person who has not previously been convicted of an offense under this Article or under any statute of the United States or any state relating to controlled substances included in any schedule of this Article or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or has been found guilty of (i) a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, or by possessing drug paraphernalia as prohibited by G.S. 90-113.21, or (ii) a felony under G.S. 90-95(a)(3) by possessing less than one gram of cocaine, the court may, upon application of the person not sooner than 12 months after conviction, order cancellation of the judgment of conviction and expunction of the records of his arrest, indictment, or information, trial and conviction. A conviction in which the judgment of conviction has been canceled and the records expunged pursuant to this section shall not be thereafter deemed a conviction for purposes of this section or for purposes of disqualifications or liabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions of this Article. Cancellation and expunction under this section may occur only once with respect to any person. Disposition of a case under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal.

The granting of an application filed under this section shall cause the issue of an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to the petitioner's arrest, indictment, or information, trial, finding of guilty, judgment of conviction, cancellation of the judgment, and expunction of records pursuant to this section.

The judge to whom the petition is presented is authorized to call upon a probation officer for additional investigation or verification of the petitioner's conduct since conviction. If the court determines that the petitioner was convicted of (i) a misdemeanor under this Article for possessing a controlled substance included within Schedules II through VI of this Article, or for possessing drug paraphernalia as prohibited in G.S. 90-113.21, or (ii) a felony under G.S. 90-95(a)(3) for possession of less than one gram of cocaine, that he was not over 21 years of age at the time of the offense, that he has been of good behavior since his conviction, that he has successfully completed a drug education program approved for this purpose by the Department of Human Resources, and that he has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to or since the conviction for the offense in question, it shall enter an order of expunction of the petitioner's court record. The effect of such order shall be to restore the petitioner in the contemplation of the law to the status he occupied before arrest or indictment or information or conviction. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or conviction, or trial in response to any inquiry made of him for any purpose. The judge may waive the condition that the petitioner attend the drug education school if the judge makes a specific finding that there was no drug education school within a reasonable distance of the defendant's residence or that there were specific extenuating circumstances which made it likely that the petitioner would not benefit from the program of instruction.

The court shall also order that all law-enforcement agencies bearing records of the conviction and records relating thereto to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency, as appropriate, and the arresting agency shall forward the order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons whose judgments of convictions have been canceled and expunged under the provisions of this Article, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons whose judgments of convictions have been canceled and expunged. The information contained in the file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under this Article has been previously granted cancellation and expunction of a judgment of conviction pursuant to the terms of this Article. (1971, c. 919, s. 1; 1973, c. 654, s. 2; c. 1066; 1977, 2nd Sess., c. 1147, s. 11B; 1979, c. 431, ss. 3, 4; c. 550; 1981, c. 922, ss. 1-4; 1994, Ex. Sess., c. 11, s. 1.1.)

Effect of Amendments. — The 1994 Extra Session amendment, effective May 1, 1994, in subsection (a) added the designation "(i)", substituted "Article" for "Article," preceding "or by possessing drug paraphernalia", and inserted "or (ii) a felony under G.S. 90-95 (a)(3) by possessing less than one gram of cocaine"; substituted "offense" for "misdemeanor" preceding "in question" in subdivisions (b)(1) and (b)(3); inserted "or a felony under G.S. 90-95(a)(3) by possessing less than one gram of cocaine" in subsection (d); in subsection (e), in the first paragraph inserted the "(i)" designation and inserted "or (ii) a felony under G.S. 90-95(a)(3) by possessing less than one gram of cocaine", and in the third paragraph inserted the "(i)" designation and inserted "or a (ii) felony under G.S. 90-95 (a)(3) for possession of less than one gram of cocaine" and substituted "offense" for "misdemeanor" preceding "in question" in the second sentence.

§ 90-98. Attempt and conspiracy; penalties.

CASE NOTES

Cited in State v. Williamson, 110 N.C. App. 626, 430 S.E.2d 467 (1993).

§ 90-108. (See editor's note for date change) Prohibited acts; penalties.

Editor's Note. —
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

Maintaining Vehicle — Evidence Held Insufficient. — Where the evidence indicated that defendant possessed marijuana while in his car, and that on the following day drug paraphernalia were found at defendant's home, and authorities found one marijuana cigarette in defendant's car and two marijuana cigarettes at defendant's home, the evidence was insufficient to establish that defendant's vehicle was "used for the keeping or selling of" a controlled substance. State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994).

Constructive Possession in Vehicle. — If a defendant possesses a controlled substance while in a vehicle, he is guilty at least of possession of a controlled substance. If a vehicle contains a controlled substance but the defendant is not in the vehicle, he may be guilty of possession of a controlled substance by operation of the doctrine of constructive possession. State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994).

Cited in State v. McEachern, 114 N.C. App. 218, 441 S.E.2d 574 (1994).

§ 90-112. Forfeitures.

CASE NOTES

Defendant's vehicle was subject to forfeiture, etc. —
Husband's testimony concerning his guilty pleas and his use of the defendant's vehicle while carrying a backpack containing proceeds from drug transactions were adequate to support a finding that the vehicle was used in the commission of a felony and that it was subject to forfeiture. State v. Honaker, 111 N.C. App. 216, 431 S.E.2d 869 (1993).

OPINIONS OF ATTORNEY GENERAL

Money or personal property seized on the grounds it is subject to forfeiture, may not be released without a court order to the Department of Revenue for satisfaction of controlled substance excise taxes owed by the property's owner. See opinion of Attorney General to Secretary Janice H. Faulkner, — N.C.A.G. — (July 19, 1994).

When a state or local law enforcement agency seizes money or personal property as evidence of a state controlled substances law violation or on the grounds the property is subject to forfeiture and subsequently releases it without a court order to the Department of Revenue for satisfaction of controlled substance excise taxes owed by the property's owner, the court may not order the law enforcement agency which releases the property to pay into the court substitute funds of equal value. See opinion of Attorney General to Secretary Janice H. Faulkner, — N.C.A.G. — (July 19, 1994).

If a state or local law enforcement agency deposits funds with the court in substitution for money or personal property seized by the agency as evidence of a state controlled substances law violation or on the grounds it is subject to forfeiture but subsequently releases without a court order to the Department of Revenue for satisfaction of controlled substance excise taxes owed by the property's owner, the court may not order the substitute funds turned over to the owner of the original property or forfeit the substitute funds. See opinion of Attorney General to Secretary Janice H. Faulkner, — N.C.A.G. — (July 19, 1994).

§ 90-112.1. Remission or mitigation of forfeitures; possession pending trial.

CASE NOTES

No Right to Jury Trial. —

An action under this section is in the nature of an action for replevin and is in essence a civil action; as such, the right to a jury trial, if any, is governed by N.C. Const., Art. I, § 25, and thus, defendant was not entitled to a trial by jury for her remission action. State v. Honaker, 111 N.C. App. 216, 431 S.E.2d 869 (1993).

ARTICLE 5A.

North Carolina Toxic Vapors Act.

§ 90-113.13. (Effective October 1, 1994 — See editor's note) Violation a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 5B.

Drug Paraphernalia.

§ 90-113.22. (See editor's note for date change) Possession of drug paraphernalia.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

Cited in State v. Sullivan, 110 N.C. App. 779, 431 S.E.2d 502 (1993).

§ 90-113.23. (See editor's note for date change) Manufacture or delivery of drug paraphernalia.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-113.24. (See editor's note for date change) Advertisement of drug paraphernalia.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 5C.

North Carolina Substance Abuse Professionals Certification Act.

§ 90-113.30. Declaration of purpose.

The North Carolina Substance Abuse Professionals Certification Board, established by G.S. 90-113.32, is recognized as the certifying authority for certified substance abuse counselors and certified substance abuse prevention consultants in order to safeguard the public health, safety, and welfare, to protect the public from being harmed by unqualified persons, to assure the highest degree of professional care and conduct on the part of certified substance abuse counselors and certified substance abuse prevention consultants, to provide for the establishment of standards for the education of substance abuse counselors and substance abuse prevention consultants, and to ensure the availability of substance abuse counseling services and substance abuse prevention services of high quality to persons in need of these services. It is the purpose of this Article to provide for the regulation of Board-certified persons offering substance abuse counseling services, substance abuse prevention services, or any other substance abuse services for which the Board may grant certification. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 685, s. 4, made this Article effective July 1, 1994, and applicable to requirements imposed on or after that date, and to causes of action, whether civil, criminal, or administrative, arising on or after that date.

§ 90-113.31. Definitions.

In this Article, unless the context clearly requires otherwise, the following definitions apply:

(1) "Board" means the North Carolina Substance Abuse Professionals Certification Board.

(2) "Certified substance abuse counselor" means any person certified to practice substance abuse counseling in accordance with the provisions of this Article.

(3) "Substance abuse counseling" means the assessment, evaluation, or provision of counseling to persons suffering from substance abuse or dependency, alcohol abuse or dependency, or drug abuse or dependency.

(4) "Certified substance abuse prevention consultant" means any person certified to practice substance abuse prevention in accordance with the provisions of this Article.

(5) "Prevention" means the reduction, delay, or avoidance of alcohol and of other drug use behavior. "Prevention" includes the promotion of positive environments and individual strengths that contribute to personal health and well-being over an entire life and the development of strategies that encourage individuals, families, and communities to take part in assessing and changing their lifestyle and environments. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.32. Board.

(a) The Board is created as the certifying authority for substance abuse counselors and substance abuse prevention consultants in North Carolina.

(b) Until the full Board is elected or appointed pursuant to subsection (c) of this section, the Board shall consist of 16 members with one member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121, and one member appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121. The remaining 14 shall be those members of the current North Carolina Substance Abuse Professionals Certification Board, Inc., who have terms that are unexpired as of the effective date of this Article. The initial Board shall appoint an initial Nominating and Elections Committee to fill immediate vacancies on the Board, using the process established in subsection (d) of this section. The election and appointment process of the initial Board shall result in a Board of 19 members by April 1, 1995. As these initial members' terms expire, their successors shall be appointed as described in subsection (c) of this section, until the permanent Board is established, as described in subsection (c) of this section. Time spent as an initial member counts in determining the limitation on consecutive terms prescribed in subsection (e) of this section.

(c) After the initial Board members' terms expire, the Board shall consist of 19 members, all of whom shall reside in North Carolina, appointed or elected as follows:

(1) Eleven professionals certified pursuant to this Article and elected by the certified professionals, at least two of whom shall serve each of the four Division of Mental Health, Developmental Disabilities, and Substance Abuse Services regions of the State;

(2) Three members at large chosen from laypersons or other professional disciplines who have shown a special interest in the field of substance abuse, nominated by the Nominations and Elections Committee established by subsection (d) of this section and elected by the Board;

(3) Two members from the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, Department of Human Resources, appointed by the Chief of Substance Abuse Services Section, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, Department of Human Resources, at least one of whom is from the Substance Abuse Services Section;

(4) One member of the public at large appointed by the Governor; and

(5) One member of the public at large appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121 and one member of the public at large appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121.

No members of the General Assembly shall serve on the Board.

(d) The Board shall appoint five professionals from the field of substance abuse counseling and substance abuse prevention consulting to serve on the Nominating and Elections Committee. Of these five, at least three shall not be members of the Board. The Board shall appoint a member of the Nominating and Elections Committee to serve as chair. The Committee's purpose is to accept nominations from professionals certified by the Board to fill vacancies on the Board in membership categories prescribed by subdivisions (1) and (2) of subsection (c) of this section and to conduct the election of Board members. The Committee shall solicit nominations from all professionals it has certified under this Article whenever such a vacancy occurs and when elected members' terms are due to expire. The certified professionals shall submit to the Committee all nominations within 90 days before the election of new Board members. The Committee shall furnish all certified professionals with a ballot containing all the nominees for each elected Board member vacancy. In soliciting and making nominations for this process, the Committee shall give consideration to factors that promote representation on the Board by professionals certified by the Board. The Committee shall serve for a two-year term, its successors to be appointed for the same term by the Board.

(e) Members of the Board shall serve for three-year terms. No Board member shall serve for more than two consecutive terms, but a person who has been a member for two consecutive terms may be reappointed after being off the Board for a period of at least one year. When a vacancy occurs in an unexpired term, the Board shall appoint temporary members to serve until the next membership election. Time spent as a temporary member does not count in determining the limitation on consecutive terms. (1993 (Reg. Sess., 1994), c. 685, s. 1; c. 773, ss. 15.2(a), 15.2(b).)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment by c. 773, s. 15.2, effective July 16, 1994, in subsection (b), in the first sentence, twice inserted "General Assembly upon the recommendation of the," and twice inserted "in accordance with G.S. 120-121"; and in subdivision (c)(5) twice inserted "General Assembly upon the recommendation of the," inserted "in accordance with G.S. 120-121," and added at the end "in accordance with G.S. 120-121."

§ 90-113.33. Board; powers and duties.

The Board shall:

(1) Examine and determine the qualifications and fitness of applicants for certification to practice in this State as substance abuse counselors and as substance abuse prevention consultants;

(2) Issue, renew, deny, suspend, or revoke certification to practice in this State or reprimand or otherwise discipline substance abuse counselors and substance abuse prevention consultants in this State;

(3) Deal with issues concerning reciprocity;

(4) Conduct investigations for the purpose of determining whether violations of this Article or grounds for disciplining exist;

(5) Employ the professional and clerical personnel necessary to carry out the provisions of this Article. The Board may purchase or rent necessary office space, equipment, and supplies;

(6) Conduct administrative hearings in accordance with Chapter 150B of the General Statutes when a "contested case", as defined in Chapter 150B, arises;

(7) Appoint from its own membership one or more members to act as representatives of the Board at any meeting in which it considers this representation is desirable;

(8) Establish fees for applications for examination, certificates of certification and renewal, and other services provided by the Board; and

(9) Adopt any rules necessary to carry out the purpose of this Article and its duties and responsibilities pursuant to this Article.

The powers and duties enumerated in this section are granted for the purposes of enabling the Board to safeguard the public health, safety, and welfare against unqualified or incompetent practitioners and are to be liberally construed to accomplish this objective. When the Board exercises its authority under this Article to discipline a person, it may, as part of the decision imposing the discipline, charge the costs of investigations and the hearing to the person disciplined. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.34. Records to be kept; copies of records.

The Board shall obtain documentation of all proceedings under this Article and a record of all persons certified under it. The record shall show the name, last known place of business, last known place of residence, and date and number of the certificate of certification as a certified substance abuse counselor or certified substance abuse prevention consultant for every living certified person. Any interested person in the State is entitled to obtain a copy of that record on application to the Board and upon payment of a reasonable charge that is based on the costs involved in providing the copy. The Board shall keep a hard copy of all records. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.35. Disposition of funds.

All fees and other moneys collected and received by the Board shall be used to implement this Article. The financial records of the Board shall be subjected to an annual audit and paid for out of the funds of the Board. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.36. Certificates of certification.

(a) The Board shall furnish a certificate of certification to each applicant successfully completing the requirements for certification.

(b) The Board may furnish a certificate of certification to any person in another state or territory if the individual's qualifications were, at the date of registration or certification, substantially equal to the requirements under this Article. However, an out-of-state applicant shall first file application and pay any required fees. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.37. Renewal of certification; lapse; revival.

(a) Every person certified pursuant to this Article who desires to maintain certification status shall apply to the Board for a renewal of certification every other year and pay to the secretary-treasurer the prescribed fee. Renewal of certification is subject to completion of 60 hours of those continuing education requirements established by the Board. Certification that is not renewed automatically lapses, unless the Board provides for the late renewal of certification upon the payment of a late fee. No late renewal shall be granted more than five years after a certification expires. A suspended certification is subject to this section's renewal requirements and may be renewed as provided in this section. This renewal does not entitle the certified person to engage in the certified activity or in any other conduct or activity in violation of the order or judgment by which the certification was suspended, until the certification is reinstated. If a certification revoked on disciplinary grounds is reinstated and requires renewal, the certified person shall pay the renewal fee and any applicable late fee.

(b) The Board shall establish the manner in which lapsed certification may be revived or extended. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.38. Maximums for certain fees.

The combined fees to obtain a certificate of certification may not exceed three hundred dollars ($300.00). The fee to renew a certificate may not exceed one hundred dollars ($100.00). (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.39. Standards for certification.

The Board shall establish standards for certification of substance abuse professionals. The certification standards of the International Certification Reciprocity Consortium/Alcohol and Other Drug Abuse and of the National Association of Alcoholism and Drug Abuse Counselors may be used as guidelines for the Board's standards. The Board shall publish these required standards separately from its rules so as to provide easy access to the standards. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.40. Requirements for certification.

The Board shall issue a certificate certifying an applicant as a "Certified Substance Abuse Counselor" or as a "Certified Substance Abuse Prevention Consultant" if:

(1) The applicant is of good moral character;
(2) The applicant is not and has not engaged in any practice or conduct that would be grounds for disciplinary action under G.S. 90-113.44;
(3) The applicant is qualified for certification pursuant to the requirements of this Article and any rules adopted pursuant to it;
(4) The applicant has, at a minimum, a high school diploma or a high school equivalency certificate;
(5) The applicant has signed a form attesting to the intention to adhere fully to the ethical standards adopted by the Board;
(6) The applicant has completed 270 hours of Board-approved education;
(7) The applicant has documented completion of a minimum of 300 hours of Supervised Practical Training and has provided a Board-approved supervision contract between the applicant and an approved supervisor;
(8) The applicant has completed either a total of three years of supervised experience in the field, whether paid or volunteer, or, if a graduate of a Board-approved masters degree program, a total of 18 months of supervised experience in the field, whether paid or volunteer; and
(9) The applicant has successfully completed a written examination and an oral examination promulgated and administered by the Board.

The Board shall publish from time to time information in order to provide specifics for potential applicants of an acceptable educational curriculum and the terms of acceptable supervised fieldwork experience. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.41. Examination.

(a) Applicants for certification under this Article shall file an application at least 60 days prior to the date of examination and upon the forms and in the manner prescribed by the Board. The application shall be accompanied by the appropriate fee. No portion of this fee is refundable. Applicants who fail an examination may apply for reexamination upon the payment of another examination fee.

(b) Each applicant for certification under this Article shall be examined in an examination that is consistent with the examination requirements of the International Certification Reciprocity Consortium/Alcohol and Other Drug Abuse.

(c) Applicants for certification shall be examined at a time and place and under the supervision that the Board determines. Examinations shall be given in this State at least twice each year.

(d) Applicants may obtain their examination scores and may review their examination papers in accordance with rules the Board adopts. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.42. Exemptions.

It is not the intent of this Article to regulate members of other regulated professions who provide substance abuse services or consultation in the normal course of the practice of their profession. Accordingly, this Article does not apply to any person registered, certified, or licensed by the State to practice any other occupation or profession while rendering substance abuse services or consultation in the performance of the occupation or profession for which he is registered, certified, or licensed. Only individuals certified under this Article may use the title "certified substance abuse counselor" or "certified substance abuse prevention consultant". (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.43. Illegal practice; misdemeanor penalty.

Except as otherwise authorized in this Article, no person shall:

(1) Practice, attempt to practice, or supervise while holding out to be a certified substance abuse counselor or a certified substance abuse prevention consultant without first having obtained a certificate of certification from the Board;

(2) Use in connection with any name any letters, words, numerical codes, or insignia indicating or implying that this person is a certified substance abuse counselor or a certified substance abuse prevention consultant unless this person is certified pursuant to this Article;

(3) Practice or attempt to practice as a certified substance abuse counselor or certified substance abuse prevention consultant with a revoked, lapsed, or suspended certification;

(4) Aid, abet, or assist any uncertified person to practice as a certified substance abuse counselor or certified substance abuse prevention consultant in violation of this Article;

(5) Knowingly serve in a position required by State law or rule or federal law or regulation to be filled by a certified substance abuse counselor or a certified substance abuse pre-

vention consultant unless that person is so certified under this Article; or

(6) Otherwise violate any of the provisions of this Article or any of the rules adopted pursuant to it.

A person who engages in any of the illegal practices enumerated by this section is guilty of a Class 1 misdemeanor. Each act of unlawful practice constitutes a distinct and separate offense. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.44. Grounds for disciplinary action.

Grounds for disciplinary action include:

(1) The employment of fraud, deceit, or misrepresentation in obtaining or attempting to obtain certification or renewal of certification;

(2) The use of drugs or alcoholic beverages to the extent that professional competency is affected, until proof of rehabilitation can be established;

(3) Conviction of an offense under any municipal, State, or federal narcotic or controlled substance law, until proof of rehabilitation can be established;

(4) Conviction of a felony or other public offense involving moral turpitude, until proof of rehabilitation can be established;

(5) An adjudication of insanity or incompetency, until proof of recovery from this condition can be established;

(6) Engaging in any act or practice violative of any of the provisions of this Article or any of the rules adopted pursuant to it, or aiding, abetting, or assisting any other person in such a violation;

(7) The commission of an act of malpractice, gross negligence, or incompetence in the practice of substance abuse counseling or in substance abuse prevention consulting;

(8) Practicing as a certified substance abuse counselor or as a certified substance abuse prevention consultant without a valid certificate; and

(9) Engaging in conduct that could result in harm or injury to the public. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.45. Enjoining illegal practices.

(a) The Board may, if it finds that any person is violating any of the provisions of this Article or of the rules adopted pursuant to it, apply in its own name to the superior court for a temporary or permanent restraining order or injunction to restrain that person from continuing these illegal practices. The court may grant injunctive relief regardless of whether criminal prosecution or other action has been or may be instituted as a result of the violation. In the court's consideration of the issue of whether to grant or continue an injunction sought by the Board, a showing of conduct in violation of the terms of this Article shall be sufficient to meet any requirement of general North Carolina injunction law for irreparable damage.

(b) The venue for actions brought under this section is the superior court of any county in which the illegal acts are alleged to have been committed or in the county where the defendant resides. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.46. Application of requirements of Article.

All persons certified by the North Carolina Substance Abuse Professionals Certification Board, Inc., as of the effective date of this Article shall be certified by the Board pursuant to this Article. All these persons are subject to all the other requirements of this Article and of the rules adopted pursuant to it. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

ARTICLE 6.

Optometry.

§ 90-117.4. (Effective October 1, 1994 — See editor's note) Judicial powers; additional data for records.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-118.11. (Effective October 1, 1994 — See editor's note) Unauthorized practice; penalty for violation of Article.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-124. (Effective October 1, 1994 — See editor's note) Rules and regulations of Board; violation a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 7.

Osteopathy.

§ 90-136. (Effective October 1, 1994 — See editor's note) Refusal, revocation or suspension of license; misdemeanors.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 8.

Chiropractic.

§ 90-143. Definitions of chiropractic; examinations; educational requirements.

CASE NOTES

Cited in Cohn v. Wilkes Regional Medical Ctr., 113 N.C. App. 275, 437 S.E.2d 889 (1994).

§ 90-147. (Effective October 1, 1994 — See editor's note) Practice without license a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-153. Licensed chiropractors may practice in public hospitals.

CASE NOTES

Hospital Not Required to Give Access. — Legislature's use of the word "may" indicates it is not a requirement that a licensed chiropractor have access to and practice chiropractic in any hospital. Cohn v. Wilkes Regional Medical Ctr., 113 N.C. App. 275, 437 S.E.2d 889 (1994).

§ 90-157.1. Free choice by patient guaranteed.

CASE NOTES

Quoted in Cohn v. Wilkes Regional Medical Ctr., 113 N.C. App. 275, 437 S.E.2d 889 (1994).

ARTICLE 9A.

Nursing Practice Act.

§ 90-171.43. License required.

CASE NOTES

Cited in State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

§ 90-171.45. (Effective October 1, 1994 — See editor's note) Violation of Article.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 9D.

Nursing Scholars Program.

§ 90-171.61. Nursing Scholars Program established; administration.

(a) There is established the Nursing Scholars Program. The North Carolina Nursing Scholars Commission shall determine selection criteria, methods of selection, and shall select recipients of scholarship loans made under the Nursing Scholars Program.

(b) The Nursing Scholars Program shall be used to provide the following:

(1) A four-year scholarship loan in the amount of five thousand dollars ($5,000) per year, per recipient, to North Carolina high school seniors or other persons interested in preparing to become a registered nurse through a baccalaureate degree program.

(2) A two-year scholarship loan in the amount of three thousand dollars ($3,000) per year, per recipient, to persons interested in preparing to be a registered nurse through an associate degree nursing program or a diploma nursing program.

(3) A two-year scholarship loan in the amount of three thousand dollars ($3,000) per year, per recipient, for two years of baccalaureate nursing study for college juniors or community college graduates interested in preparing to be a registered nurse.

(4) A two-year scholarship loan of three thousand dollars ($3,000) per year, per recipient, for two years of baccalaureate study in nursing for registered nurses who do not hold a baccalaureate degree in nursing.

(5) A two-year scholarship loan of six thousand dollars ($6,000) per year, per recipient, for two years of study leading to a master of science in nursing degree for people already holding a baccalaureate degree in nursing.

In addition to the scholarship loans awarded pursuant to subdivisions (1) through (5) of this subsection, the Commission may award pro rata scholarship loans to recipients enrolled at least half-time in study leading to a master of science in nursing degree who already hold a baccalaureate degree in nursing. In awarding all scholarship loans, the Commission shall give priority to full-time students over part-time students. The State Education Assistance Authority shall adopt specific rules to regulate scholarship loans to part-time master of science in nursing students.

Within current funds available or with any additional funds provided by the General Assembly for this purpose, the Commission may set aside slots for scholarship loans prescribed by subdivisions (1) and (2) of this subsection to enable licensed practical nurses to become registered nurses. The State Education Assistance Authority shall adopt specific rules to regulate these scholarship loans.

(c) The Commission shall adopt stringent standards, which may include minimum grade point average, scholastic aptitude test scores, and other standards deemed appropriate by the Commission, to ensure that only the best potential students receive loans under the Nursing Scholars Program. Standards adopted by the Commission shall include provisions for ensuring that the qualifications of applicants who are or would be nontraditional students are considered fairly in providing them with opportunities to compete for the loans. Loans under the Nursing Scholars Program shall be awarded only to applicants who meet the standards set by the Commission and who agree to practice nursing in North Carolina upon completion of the nursing education program supported by the loan.

(d) The Commission shall develop and administer the Nursing Scholars Program in cooperation with nursing schools at institutions approved by the Commission and the North Carolina Board of Nursing. The Nursing Scholars Program shall provide for participants to be exposed to a range of extracurricular activities while in school, which activities shall be aimed at instilling in students a strong motivation to remain in the practice of nursing and to provide leadership for the nursing profession.

(e) The Commission may form regional review committees to assist it in identifying the best high school seniors and other applicants for the program. The Commission and the review committees shall make an effort to identify and encourage minority students and students who may not otherwise consider a career in nursing to apply for the Nursing Scholars Program.

(f) Upon the naming of recipients of loans from the Nursing Scholars Program, the Commission shall inform the State Education Assistance Authority (SEAA) of its decisions. The SEAA shall perform all of the administrative functions necessary to implement this Article, which functions shall include: rule-making, dissemination of information to the public, distribution and receipt of applications for scholarship loans, and the functions necessary for the execution, payment, and enforcement of promissory notes required under this Article. (1989, c. 594, s. 1; 1991, c. 550, s. 1; 1993 (Reg. Sess., 1994), c. 769, s. 17.11(a).)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective July 1, 1994, added the last two paragraphs of subsection (b).

§ 90-171.62. Terms of loans; receipt and disbursement of funds.

(a) All scholarship loans shall be evidenced by notes made payable to the State Education Assistance Authority that bear interest at the rate of ten percent (10%) per year beginning 90 days after completion of the nursing education program, or 90 days after termination of the scholarship loan, whichever is earlier. The scholarship loan may be terminated upon the recipient's withdrawal from school or by the recipient's failure to meet the standards set by the Commission.

(b) The State Education Assistance Authority shall forgive the loan if, within seven years after graduation from a nursing education program, the recipient practices nursing in North Carolina for one year for every year a scholarship loan was provided. If the recipient repays the scholarship loan by cash payments, all indebtedness shall be repaid within ten years. The Authority may provide for accelerated repayment and for less than full-time employment options to encourage the practice of nursing in either geographic or nursing specialty shortage areas. The Authority shall adopt specific rules to designate these geographic areas and these nursing specialty shortage areas, upon recommendations of the North Carolina Center for Nursing. The North Carolina Center for Nursing shall base its recommendations on objective information provided by interested groups or agencies and upon objective information collected by the Center. The Authority may forgive the scholarship loan if it determines that it is impossible for the recipient to practice nursing in North Carolina for a sufficient time to repay the loan because of the death or permanent disability of the recipient within ten years following graduation or termination of enrollment in a nursing education program.

(c) All funds appropriated to or otherwise received by the Nursing Scholars Program for scholarships, all funds received as repayment of scholarship loans, and all interest earned on these funds, shall be placed in a revolving fund. This revolving fund may be used only for scholarship loans granted under the Nursing Scholars Program. (1989, c. 594, s. 1; 1991, c. 550, s. 1.1; 1993 (Reg. Sess., 1994), c. 769, s. 17.11(b).)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective July 1, 1994, inserted the third, fourth, and fifth sentences of subsection (b).

ARTICLE 10A.

Practice of Midwifery.

§ 90-178.7. (Effective October 1, 1994 — See editor's note) Enforcement.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 11.

Veterinarians.

§ 90-182. North Carolina Veterinary Medical Board; appointment, membership, organization.

Editor's Note. — Session Laws 1993, c. 500, s. 19, as amended by 1993 (Reg. Sess., 1994) c. 774, s. 19, provides that Section 3 of Session Laws 1993, c. 500, which amended subsection (a) of this section, does not affect the term of office of any member serving on the date the act becomes effective, October 1, 1993, and that the total membership on the North Carolina Veterinary Medical Board, as set forth in Section 3, is temporarily increased to eight during the remainder of the term of office of the member appointed by the House of Representatives.

§ 90-187.6. (See editor's note for date change) Veterinary technicians and veterinary employees.

Editor's Note. —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-187.12. (Effective October 1, 1994 — See editor's note) Unauthorized practice; penalty.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 12A.

Podiatrists.

§ 90-202.3. (Effective October 1, 1994 — See editor's note) Unlawful to practice unless registered.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-202.12. Free choice by patient guaranteed.

CASE NOTES

Quoted in Cohn v. Wilkes Regional Medical Ctr., 113 N.C. App. 275, 437 S.E.2d 889 (1994).

§ 90-210.25. (See editor's note for date change) Licensing.

Editor's Note. —
Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-210.43. (See editor's note for date change) Licensing and inspection.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-210.50. (See editor's note for date change) Rulemaking, applicability, violations, and prohibitions of Article.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 13D.

Funeral and Burial Trust Funds.

§ 90-210.70. Penalties.

(a) Anyone who embezzles or who fraudulently, or knowingly and willfully misapplies, or in any manner converts preneed funeral funds to his own use, or for the use of any partnership, corporation, association, or entity for any purpose other than as authorized by this Article; or anyone who takes, makes away with or secretes, with intent to embezzle or fraudulently or knowingly and willfully misapply or in any manner convert preneed funeral funds for his own use or the use of any other person for any purpose other than as authorized by this Article shall be punished as a Class H felon. Each such embezzlement, conversion, or misapplication shall constitute a separate offense and may be prosecuted individually. Upon conviction, all licenses issued under this Article shall be revoked.

(b) Any person who willfully violates any other provision of this Article shall be guilty of a Class 1 misdemeanor. Each such violation shall constitute a separate offense and may be prosecuted individually.

(c) If a corporation embezzles or fraudulently or knowingly and willfully misapplies or converts preneed funeral funds as provided in subsection (a) hereof or otherwise violates any provision of this Article, the officers, directors, agents, or employees responsible for committing the offense shall be fined or imprisoned as herein provided.

(d) The Board shall have the power to investigate violations of this section and shall deliver all evidence of violations to the district attorney in the county where the offense occurred. The Board shall, with the fees collected under this Article, employ legal counsel and other staff to monitor preneed trusts, investigate complaints, audit preneed trusts, and be responsible for delivering evidences to the district attorney when there is evidence of criminal violation. The record of complaints, auditing, and enforcement shall be presented in an annual report from the Board to the General Assembly. (1969, c. 187, s. 8; 1985, c. 12, s. 1; 1991 (Reg. Sess., 1992), c. 901, s. 2; 1993 (Reg. Sess., 1994), c. 767, s. 28.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, substituted "Class 1 misdemeanor" for "misdemeanor and shall be fined not less than five hundred dollars ($500.00), or shall be imprisoned for not less than 30 days nor more than two years, or both" in subsection (b).

ARTICLE 15B.

Blood Banks.

§ 90-220.12. (Effective October 1, 1994 — See editor's note) Supervision of licensed physician required; penalty for violation.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 16.

Dental Hygiene Act.

§ 90-233.1. (Effective October 1, 1994 — See editor's note) Violation a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 17.

Dispensing Opticians.

§ 90-251. (Effective October 1, 1994 — See editor's note) Licensee allowing unlicensed person to use his certificate or license.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-252. (Effective October 1, 1994 — See editor's note) Engaging in practice without license.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-255.1. (Effective October 1, 1994 — See editor's note) Sale of flammable frames.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 18A.

Psychology Practice Act.

§ 90-270.2. Definitions.

The following definitions apply in this Article:

(1) Board. — The North Carolina Psychology Board.

(2) Examination. — Any and all examinations that are adopted by the Board and administered to applicants and licensees, including, but not limited to, the national examination, Board-developed examinations, and other examinations that assess the competency and ethics of psychologists and applicants.

(3) Jurisdiction. — Any governmental authority, including, but not limited to, a state, a territory, a commonwealth, a

district of the United States, and a country or a local governmental authority thereof, that licenses, certifies, or registers psychologists.

(4) Health services. — Those activities of the practice of psychology that include the delivery of preventive, assessment, or therapeutic intervention services directly to individuals whose growth, adjustment, or functioning is actually impaired or may be at substantial risk of impairment.

(5) Institution of higher education. — A university, a college, a professional school, or another institution of higher learning that:

a. In the United States, is regionally accredited by bodies approved by the Commission on Recognition of Postsecondary Accreditation or its successor.

b. In Canada, holds a membership in the Association of Universities and Colleges of Canada.

c. In another country, is accredited by the comparable official organization having this authority.

(6) Licensed psychologist. — An individual to whom a license has been issued pursuant to the provisions of this Article, whose license is in force and not suspended or revoked, and whose license permits him or her to engage in the practice of psychology as defined in this Article.

(7) Licensed psychological associate. — An individual to whom a license has been issued pursuant to the provisions of this Article, whose license is in force and not suspended or revoked, and whose license permits him or her to engage in the practice of psychology as defined in this Article.

(8) Practice of psychology. — The observation, description, evaluation, interpretation, or modification of human behavior by the application of psychological principles, methods, and procedures for the purpose of preventing or eliminating symptomatic, maladaptive, or undesired behavior or of enhancing interpersonal relationships, work and life adjustment, personal effectiveness, behavioral health, or mental health. The practice of psychology includes, but is not limited to: psychological testing and the evaluation or assessment of personal characteristics such as intelligence, personality, abilities, interests, aptitudes, and neuropsychological functioning; counseling, psychoanalysis, psychotherapy, hypnosis, biofeedback, and behavior analysis and therapy; diagnosis and treatment of mental and emotional disorder or disability, alcoholism and substance abuse, disorders of habit or conduct, as well as of the psychological aspects of physical illness, accident, injury, or disability; and psychoeducational evaluation, therapy, remediation, and consultation. Psychological services may be rendered to individuals, families, groups, and the public. The practice of psychology shall be construed within the meaning of this definition without regard to whether payment is received for services rendered.

(9) Psychologist. — A person represents himself or herself to be a psychologist if that person uses any title or description of services incorporating the words "psychology", "psychological", "psychologic", or "psychologist", states that he or she possesses expert qualification in any area of psychology, or

provides or offers to provide services defined as the practice of psychology in this Article. All persons licensed under this Article may present themselves as psychologists, as may those persons who are exempt by G.S. 90-270.4 and those who are qualified applicants under G.S. 90-270.5. (1967, c. 910, s. 2; 1977, c. 670, s. 1; 1979, c. 670, s. 1; 1993, c. 375, s. 1; 1993 (Reg. Sess., 1994), c. 569, s. 14.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective June 22, 1994, in subdivision (5)a. substituted "Commission on Recognition of Postsecondary Accreditation or its successor" for "Council on Postsecondary Accreditation."

§ 90-270.6. Psychology Board; appointment; term of office; composition.

Editor's Note. — Session Laws 1993, c. 375, which amended this section, in s. 7, as amended by Session Laws 1993 (Reg. Sess., 1994) c. 569, s. 15, provides: "This act becomes effective October 1, 1993. The Governor shall implement the requirement under G.S. 90-270.6 that Board members reside in different congressional districts by taking this factor into account when filling vacancies on or after July 1, 1995, and when making appointments to terms that commence on or after July 1, 1995."

§ 90-270.11. Licensure; examination; foreign graduates.

CASE NOTES

Stated in Reich v. Price, 110 N.C. App. 255, 429 S.E.2d 372 (1993).

§ 90-270.15. Denial, suspension, or revocation of licenses and health services provider certification, and other disciplinary and remedial actions for violations of the Code of Conduct; relinquishing of license.

(a) Any applicant for licensure or health services provider certification and any person licensed or certified under this Article shall have behaved in conformity with the ethical and professional standards specified in this Code of Conduct and in the rules of the Board. The Board may deny, suspend, or revoke licensure and certification, and may discipline, place on probation, limit practice, and require examination, remediation, and rehabilitation, or any combination thereof, all as provided for in subsection (b) below. The Board shall act upon proof that the applicant or licensee engaged in illegal, immoral, dishonorable, unprofessional, or unethical conduct by violating any of the provisions of the Code of Conduct as follows:

(1) Has been convicted of a felony or entered a plea of guilty or nolo contendere to any felony charge;

(2) Has been convicted of or entered a plea of guilty or nolo contendere to any misdemeanor involving moral turpitude, misrepresentation or fraud in dealing with the public, or conduct otherwise relevant to fitness to practice psychology, or a misdemeanor charge reflecting the inability to practice psychology with due regard to the health and safety of clients or patients;

(3) Has engaged in fraud or deceit in securing or attempting to secure or renew a license or in securing or attempting to secure health services provider certification under this Article or has willfully concealed from the Board material information in connection with application for a license or health services provider certification, or for renewal of a license under this Article;

(4) Has practiced any fraud, deceit, or misrepresentation upon the public, the Board, or any individual in connection with the practice of psychology, the offer of psychological services, the filing of Medicare, Medicaid, or other claims to any third party payor, or in any manner otherwise relevant to fitness for the practice of psychology;

(5) Has made fraudulent, misleading, or intentionally or materially false statements pertaining to education, licensure, license renewal, certification as a health services provider, supervision, continuing education, any disciplinary actions or sanctions pending or occurring in any other jurisdiction, professional credentials, or qualifications or fitness for the practice of psychology to the public, any individual, the Board, or any other organization;

(6) Has had a license or certification for the practice of psychology in any other jurisdiction suspended or revoked, or has been disciplined by the licensing or certification board in any other jurisdiction for conduct which would subject him or her to discipline under this Article;

(7) Has violated any provision of this Article or of the duly adopted rules of the Board;

(8) Has aided or abetted the unlawful practice of psychology by any person not licensed by the Board;

(9) For a licensed psychologist, has provided health services without health services provider certification;

(10) Has been guilty of immoral, dishonorable, unprofessional, or unethical conduct as defined in this subsection, or in the then-current code of ethics of the American Psychological Association, except as the provisions of such code of ethics may be inconsistent and in conflict with the provisions of this Article, in which case, the provisions of this Article control;

(11) Has practiced psychology in such a manner as to endanger the welfare of clients or patients;

(12) Has demonstrated an inability to practice psychology with reasonable skill and safety by reason of illness, inebriation, misuse of drugs, narcotics, alcohol, chemicals, or any other substance affecting mental or physical functioning, or as a result of any mental or physical condition;

(13) Has practiced psychology or conducted research outside the boundaries of demonstrated competence or the limitations of education, training, or supervised experience;

(14) Has failed to use, administer, score, or interpret psychological assessment techniques, including interviewing and observation, in a competent manner, or has provided findings or recommendations which do not accurately reflect the assessment data, or exceed what can reasonably be inferred, predicted, or determined from test, interview, or observational data;

(15) Has failed to provide competent diagnosis, counseling, treatment, consultation, or supervision, in keeping with standards of usual and customary practice in this State;

(16) In the absence of established standards, has failed to take all reasonable steps to ensure the competence of services;

(17) Has failed to maintain a clear and accurate case record which documents the following for each patient or client:
  a. Presenting problems, diagnosis, or purpose of the evaluation, counseling, treatment, or other services provided;
  b. Fees, dates of services, and itemized charges;
  c. Summary content of each session of evaluation, counseling, treatment, or other services, except that summary content need not include specific information that may cause significant harm to any person if the information were released;
  d. Test results or other findings, including basic test data; and
  e. Copies of all reports prepared;

(18) Except when prevented from doing so by circumstances beyond the psychologist's control, has failed to retain securely and confidentially the complete case record for at least seven years from the date of the last provision of psychological services; or, except when prevented from doing so by circumstances beyond the psychologist's control, has failed to retain securely and confidentially the complete case record for three years from the date of the attainment of majority age by the patient or client or for at least seven years from the date of the last provision of psychological services, whichever is longer; or, except when prevented from doing so by circumstances beyond the psychologist's control, has failed to retain securely and confidentially the complete case record indefinitely if there are pending legal or ethical matters or if there is any other compelling circumstance;

(19) Has failed to cooperate with other psychologists or other professionals to the potential or actual detriment of clients, patients, or other recipients of service, or has behaved in ways which substantially impede or impair other psychologists' or other professionals' abilities to perform professional duties;

(20) Has exercised undue influence in such a manner as to exploit the client, patient, student, supervisee, or trainee for the financial or other personal advantage or gratification of the psychologist or a third party;

(21) Has harassed or abused, sexually or otherwise, a client, patient, student, supervisee, or trainee;

(22) Has failed to cooperate with or to respond promptly, completely, and honestly to the Board, to credentials commit-

tees, or to ethics committees of professional psychological associations, hospitals, or other health care organizations or educational institutions, when those organizations or entities have jurisdiction; or has failed to cooperate with institutional review boards or professional standards review organizations, when those organizations or entities have jurisdiction; or

(23) Has refused to appear before the Board after having been ordered to do so in writing by the Chair;

(b) Upon proof that an applicant or licensee under this Article has engaged in any of the prohibited actions specified in subsection (a) of this section, the Board may, in lieu of denial, suspension, or revocation, issue a formal reprimand or formally censure the applicant or licensee, may place the applicant or licensee upon probation with such appropriate conditions upon the continued practice as the Board may deem advisable, may require examination, remediation, or rehabilitation for the applicant or licensee, including care, counseling, or treatment by a professional or professionals designated or approved by the Board, the expense to be borne by the applicant or licensee, may require supervision for the services provided by the applicant or licensee by a licensee designated or approved by the Board, the expense to be borne by the applicant or licensee, may limit or circumscribe the practice of psychology provided by the applicant or licensee with respect to the extent, nature, or location of the services provided, as the Board deems advisable, or may discipline and impose any appropriate combination of the foregoing. In addition, the Board may impose such conditions of probation or restrictions upon continued practice at the conclusion of a period of suspension or as requirements for the restoration of a revoked or suspended license. In lieu of or in connection with any disciplinary proceedings or investigation, the Board may enter into a consent order relative to discipline, supervision, probation, remediation, rehabilitation, or practice limitation of a licensee or applicant for a license.

(c) The Board may assess costs of disciplinary action against an applicant or licensee found to be in violation of this Article.

(d) When considering the issue of whether or not an applicant or licensee is physically or mentally capable of practicing psychology with reasonable skill and safety with patients or clients, then, upon a showing of probable cause to the Board that the applicant or licensee is not capable of practicing psychology with reasonable skill and safety with patients or clients, the Board may petition a court of competent jurisdiction to order the applicant or licensee in question to submit to a psychological evaluation by a psychologist to determine psychological status or a physical evaluation by a physician to determine physical condition, or both. Such psychologist or physician shall be designated by the court. The expenses of such evaluations shall be borne by the Board. Where the applicant or licensee raises the issue of mental or physical competence or appeals a decision regarding mental or physical competence, the applicant or licensee shall be permitted to obtain an evaluation at the applicant's or licensee's expense. If the Board suspects the objectivity or adequacy of the evaluation, the Board may compel an evaluation by its designated practitioners at its own expense.

(e) Except as provided otherwise in this Article, the procedure for revocation, suspension, denial, limitations of the license or health services provider certification, or other disciplinary, remedial, or rehabilitative actions, shall be in accordance with the provisions of Chapter 150B of the General Statutes. The Board is required to provide the opportunity for a hearing under Chapter 150B to any applicant whose license or health services provider certification is denied or to whom licensure or health services provider certification is offered subject to any restrictions, probation, disciplinary action, remediation, or other conditions or limitations, or to any licensee before revoking, suspending, or restricting a license or health services provider certificate or imposing any other disciplinary action or remediation. If the applicant or licensee waives the opportunity for a hearing, the Board's denial, revocation, suspension, or other proposed action becomes final without a hearing's having been conducted. Notwithstanding the foregoing, no applicant or licensee is entitled to a hearing for failure to pass an examination. In any proceeding before the Board, in any record of any hearing before the Board, in any complaint or notice of charges against any licensee or applicant for licensure, and in any decision rendered by the Board, the Board may withhold from public disclosure the identity of any clients or patients who have not consented to the public disclosure of psychological services' having been provided by the licensee or applicant. The Board may close a hearing to the public and receive in closed session evidence involving or concerning the treatment of or delivery of psychological services to a client or a patient who has not consented to the public disclosure of such treatment or services as may be necessary for the protection and rights of such patient or client of the accused applicant or licensee and the full presentation of relevant evidence. All records, papers, and other documents containing information collected and compiled by or on behalf of the Board, as a result of investigations, inquiries, or interviews conducted in connection with licensing or disciplinary matters will not be considered public records within the meaning of Chapter 132 of the General Statutes; provided, however, that any notice or statement of charges against any licensee or applicant, or any notice to any licensee or applicant of a hearing in any proceeding, or any decision rendered in connection with a hearing in any proceeding, shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of such investigation, inquiry, or hearing except that identifying information concerning the treatment of or delivery of services to a patient or client who has not consented to the public disclosure of such treatment or services may be deleted; and provided, further, that if any such record, paper, or other document containing information theretofore collected and compiled by or on behalf of the Board, as hereinbefore provided, is received and admitted in evidence in any hearing before the Board, it shall thereupon be a public record within the meaning of Chapter 132 of the General Statutes, subject to any deletions of identifying information concerning the treatment of or delivery of psychological services to a patient or client who has not consented to the public disclosure of such treatment or services.

(f) A license and a health services provider certificate issued under this Article are suspended automatically by operation of law after failure to renew a license for a period of more than sixty days after the renewal date. The Board may reinstate a license and a health services provider certificate suspended under this subsection upon payment of a fee as specified in G.S. 90-270.18(b), and may require that the applicant file a new application, furnish new supervisory reports or references or otherwise update his or her credentials, or submit to examination for reinstatement. Notwithstanding any provision to the contrary, the Board retains full jurisdiction to investigate alleged violations of this Article by any person whose license is suspended under this subsection and, upon proof of any violation of this Article by any such person, the Board may take disciplinary action as authorized by this section.

(g) A person whose license or health services provider certification has been denied or revoked may reapply to the Board for licensure or certification after the passage of one calendar year from the date of such denial or revocation.

(h) A licensee may, with the consent of the Board, voluntarily relinquish his or her license or health services provider certificate at any time. The Board may delay or refuse the granting of its consent as it may deem necessary in order to investigate any pending complaint, allegation, or issue regarding violation of any provision of this Article by the licensee. Notwithstanding any provision to the contrary, the Board retains full jurisdiction to investigate alleged violations of this Article by any person whose license is relinquished under this subsection and, upon proof of any violation of this Article by any such person, the Board may take disciplinary action as authorized by this section.

(i) The Board may adopt such rules as it deems reasonable and appropriate to interpret and implement the provisions of this section. (1967, c. 910, s. 15; 1973, c. 1331, s. 3; 1977, c. 670, s. 9; 1979, c. 1005, s. 4; 1985, c. 734, s. 9; 1987, c. 827, s. 1; 1991, c. 239, s. 1; c. 761, ss. 14-16; 1993, c. 375, s. 1; 1993 (Reg. Sess., 1994), c. 570, s. 7.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment substituted "closed session" for "executive session" in the sixth sentence of subsection (e).

§ 90-270.16. Prohibited acts.

CASE NOTES

Cited in State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

§ 90-270.17. (Effective October 1, 1994 — See editor's note) Violations and penalties.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-270.20. Provision of health services; certification as health services provider.

(a) Health services, as defined in G.S. 90-270.2(4) and G.S. 90-270.2(8), may be provided by qualified licensed psychological associates, qualified licensed psychologists holding provisional, temporary, or permanent licenses, or qualified applicants. Qualified licensed psychological associates, qualified licensed psychologists holding provisional or temporary licenses, or qualified applicants may provide health services only under supervision as specified in the duly adopted rules of the Board.

(b) After January 1, 1995, any licensed psychologist who is qualified by education, who holds permanent licensure and a doctoral degree, and who provides or offers to provide health services to the public must be certified as a health services provider psychologist (HSP-P) by the Board. The Board shall certify as health services provider psychologists those applicants who shall demonstrate at least two years of acceptable supervised health services experience, of which at least one year is postdoctoral. The Board shall specify the format, setting, content, and organization of the supervised health services experience or program. The Board may, upon verification of supervised experience and the meeting of all requirements as a licensed psychologist, issue the license and certificate simultaneously. An application fee, as specified in G.S. 90-270.18(b)(9), must be paid.

(c) After January 1, 1995, any licensed psychological associate who is qualified by education may be granted certification as a health services provider psychological associate (HSP-PA). The Board may, upon verification of qualifications and the meeting of all requirements as a licensed psychological associate, issue the license and certificate simultaneously. An application fee, as specified in G.S. 90-270.18(b)(9), must be paid.

(d) After January 1, 1995, any licensed psychologist holding a provisional license who is qualified by education may be granted certification as a health services provider psychologist (provisional) (HSP-PP) by the Board. The Board may, upon verification of qualifications and the meeting of all requirements for a provisional license, issue the license and certificate simultaneously. An application fee, as specified in G.S. 90-270.18(b)(9), must be paid.

(e) Notwithstanding the provisions of subsection (b) of this section, if application is made to the Board before June 30, 1994, by a licensed psychologist who is listed in the National Register of Health Services Providers in Psychology, or who holds permanent licensure and who can demonstrate that he or she has been engaged acceptably in the provision of health services for two years or its equivalent, that licensed psychologist shall be certified as a health services provider psychologist. The applicant, in order to demonstrate two years of acceptable experience or its equivalent, must meet one of the following conditions:

(1) The applicant is a diplomate in good standing of the American Board of Professional Psychology in any of the areas of professional practice deemed appropriate by the Board;

(2) The applicant has the equivalent of two years of acceptable full-time experience, one of which was postdoctoral, at sites where health services are provided;

(3) The applicant submits evidence satisfactory to the Board demonstrating that he or she has been engaged acceptably for the equivalent of at least two years full-time in the provision of health services; or

(4) Any other conditions that the Board may deem acceptable.

(f) Notwithstanding the provisions of subsection (c) of this section, if application is made to the Board before June 30, 1994, by a licensed psychological associate who can demonstrate that he or she has been engaged acceptably in the provision of health services under supervision for two years or its equivalent, that licensed psychological associate shall be certified as a health services provider psychological associate.

(g) The Board shall have the authority to deny, revoke, or suspend the health services provider certificate issued pursuant to these subsections upon a finding that the psychologist has not behaved in conformity with the ethical and professional standards prescribed in G.S. 90-270.15. (1985, c. 734, s. 10; 1993, c. 375, s. 1; 1993 (Reg. Sess., 1994), c. 569, s. 13.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective June 22, 1994, in subsection (a), in the first sentence substituted "G.S. 90-270.2(4) and G.S. 90-270.2(8)" for "G.S. 90-270.2(e) and G.S. 90-270.2(h)."

ARTICLE 18B.

Physical Therapy.

§ 90-270.35. (Effective October 1, 1994 — See editor's note) Unlawful practice.

Except as otherwise authorized in this Article, if any person, firm, or corporation shall:

(1) Practice, attempt to practice, teach, consult, or supervise in physical therapy, or hold out any person as being able to do any of these things in this State, without first having obtained a license or authorization from the Board for the person performing services or being so held out;

(2) Use in connection with any person's name any letters, words, numerical codes, or insignia indicating or implying that the person is a physical therapist or physical therapist assistant, or applicant with "Graduate" status, unless the person is licensed or authorized in accordance with this Article;

(3) Practice or attempt to practice physical therapy with a revoked, lapsed, or suspended license;

(4) Practice physical therapy and fail to refer to a licensed medical doctor or dentist any patient whose medical condition should have, at the time of evaluation or treatment, been determined to be beyond the scope of practice of a physical therapist;

(5) Aid, abet, or assist any unlicensed person to practice physical therapy in violation of this Article; or

(6) Violate any of the provisions of this Article;

said person, firm, or corporation shall be guilty of a Class 1 misdemeanor. Each act of such unlawful practice shall constitute a distinct and separate offense. (1951, c. 1131, ss. 9, 11; 1969, c. 556; 1979, c. 487; 1985, c. 701, s. 1; 1993, c. 539, s. 647; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — This section has been set out to correct a printing error in the main pamphlet.

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

OPINIONS OF ATTORNEY GENERAL

A podiatrist may prescribe or refer physical therapy to a licensed physical therapist for the benefit of the podiatrist's patients. See opinion of Attorney General to Mr. E. Joseph Daniels, D.P.M., AACFS, President, North Carolina Board of Podiatry Examiners, 52 N.C.A.G. 70 (1982).

ARTICLE 18C.

Marriage and Family Therapy Licensure.

§ 90-270.45. Title of Article.

This Article shall be known as the "Marriage and Family Therapy Licensure Act." (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. —

Session Laws 1993 (Reg. Sess., 1994), c. 564, which amended this section, in s. 1 provides: "This act shall be known and may be cited as the 'Marriage and Family Therapy Licensure Act of 1993.'"

Session Laws 1993 (Reg. Sess., 1994), c. 564, which amended this section, in s. 3 provides: "All members of the North Carolina Marital and Family Therapy Certification Board shall continue to be members of the North Carolina Marriage and Family Therapy Licensure Board until the expiration of their terms as members of the North Carolina Marital and Family Therapy Certification Board."

Session Laws 1993 (Reg. Sess., 1994), c. 564, which amended this section, in s. 4 provides: "(a) The North Carolina Marriage and Family Therapy Licensure Board shall be considered a continuation of the North Carolina Marital and Family Therapy Certification Board for the purpose of succession to all rights, powers, duties, and obligations of the North Carolina Marital and Family Therapy Certification Board.

"(b) No action or proceeding involving the North Carolina Marital and Family Therapy Certification Board that is pending on the effective date of this act [January 1, 1995] shall be affected by this act. No cause of action arising under this Article before the effective date of this act [January 1, 1995] is affected by this act.

"(c) All rules, regulations, acts, determinations, and decisions of the North Carolina Marital and Family Therapy Certification Board in force on the effective date of this act [January 1, 1995] shall continue in force as rules, regulations, acts, determinations, and decisions of the North Carolina Marriage and Family Therapy Licensure Board until modified or repealed by the North Carolina Marriage and Family Therapy Licensure Board."

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "Marriage and Family Therapy Licensure Act" for "Marital and Family Therapy Certification Act" in the article heading and in this section.

§ 90-270.46. Policy and purpose.

Marriage and family therapy in North Carolina is a professional practice that affects the public safety and welfare and requires appropriate licensure and control in the public interest.

It is the purpose of this Article to establish a licensure agency, a structure, and procedures that will (i) ensure that the public has a means of protecting itself from the practice of marriage and family therapy by unprofessional, unauthorized, and unqualified individuals, and (ii) protect the public from unprofessional, improper, unauthorized and unqualified use of certain titles by persons who practice marriage and family therapy. This Article shall be liberally construed to carry out these policies and purposes. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, in the first paragraph substituted "Marriage" for "Marital," deleted "the State of" preceding "North Carolina," deleted "declared to be" preceding "a professional practice," substituted "that affects" for "which affects," and substituted "licensure" for "certification"; in the second paragraph, in the first sentence, substituted "licensure" for "certification," substituted "that" for "which", inserted "(i)," inserted "the practice of marriage and family therapy by unprofessional, unauthorized, and unqualified individuals, and (ii) protect the public from," and substituted "marriage" for "marital."

§ 90-270.47. Definitions.

As used in this Article, unless the context clearly requires a different meaning:

(1) "Allied mental health field" and "degree" mean:
   a. Master's or doctoral degree in clinical social work;
   b. Master's or doctoral degree in psychiatric nursing;
   c. Master's or doctoral degree in counseling or clinical or counseling psychology;
   d. Doctor of medicine or doctor of osteopathy degree with an appropriate residency training in psychiatry; or
   e. Master's or doctoral degree in any mental health field the course of study of which is equivalent to the master's degree in marriage and family therapy.

(2) "Board" means the North Carolina Marriage and Family Therapy Licensure Board.

(3) "Licensed marriage and family therapist" means a person to whom a license has been issued pursuant to this Article, if the license is in force and not suspended or revoked.

(3a) "Marriage and family therapy" is the clinical practice, within the context of marriage and family systems, of the diagnosis and treatment of psychosocial aspects of mental and emotional disorders. Marriage and family therapy involves the professional application of psychotherapeutic and family systems theories and techniques in the delivery of services to families, couples, and individuals for the purpose of treating these diagnosed mental and emotional disorders. Marriage and family therapy includes referrals to and collaboration with other health care professionals when appropriate.

(4) "Practice of marriage and family therapy" means the rendering of professional marriage and family therapy services to individuals, couples, or families, singly or in groups, whether the services are offered directly to the general public or through organizations, either public or private, for a fee, monetary or otherwise.

(5) "Recognized educational institution" means any educational institution that grants a bachelor's, master's, or doctoral degree and is recognized by the Board and by a nationally or regionally recognized educational or professional accrediting body. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, in subdivision (1)c. substituted "Master's or doctoral" for "Doctoral" and inserted "counseling or"; in subdivision (1)e. deleted "wherein" preceding "the course of," inserted "of which," and substituted "marriage" for "marital"; in subdivision (2) substituted "Marriage and Family Therapy Licensure" for "Marital and Family Therapy Certification"; in subdivision (3) substituted "Licensed marriage" for "Certified marital," substituted "license" for "certificate," deleted "the provisions of" preceding "this Article," substituted "if the license" for "which certificate," and deleted from the end " as of the particular time in question"; added subdivision (3a); in subdivision (4) substituted "marriage" for "marital" twice, deleted "or counseling" preceding "services to individuals," substituted "couples, or families" for "family groups and marital pairs," substituted "the services" for "such services," and deleted the definition of marital and family therapy; and in subdivision (5) substituted "that grants" for "which grants," substituted "doctoral" for "doctor's," deleted "which" preceding "is recognized," and substituted "and by" for "or by."

§ 90-270.48. Prohibited acts.

Except as specifically provided elsewhere in this Article, it is unlawful for a person not licensed as a marriage and family therapist under this Article to practice marriage or family therapy or hold himself or herself out to the public as a person practicing marriage and family therapy. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "it is unlawful for a person not licensed as a marriage and family therapist under this Article to practice marriage or family therapy or hold himself or herself out to the public as a person practicing marriage and family therapy" for "commencing January 1, 1980, no person who is not certified under this Article shall use a title or description such as 'certified marital or marriage therapist, counselor, advisor, or consultant,' 'certified marital or marriage and family therapist, counselor, advisor or consultant,' or any other name, style or description denoting that the person is a certified marital and family therapist. Nothing herein shall prohibit any person from advertising the performance of marital and family therapy or counseling services, the persons from whom it may be obtained and prices."

§ 90-270.48A. Exemptions.

(a) This Article does not prevent members of the clergy or licensed, certified, or registered members of professional groups recognized by the Board from advertising or performing services consistent with their own profession. Members of the clergy include, but are not limited to, persons who are ordained, consecrated, commissioned, or endorsed by a recognized denomination, church, faith group, or synagogue. Professional groups the Board shall recognize include, but are not limited to, certified social workers, licensed professional counselors, fee- based pastoral counselors, licensed practicing psychologists, psychological associates, physicians, and attorneys-at-law. However, in no event may a person use the title "Licensed Marriage and Family Therapist," use the letters "LMFT," or in any way imply that the person is a licensed marriage and family therapist unless the person is licensed as such under this Article.

(b) A person is exempt from the requirements of this Article if any of the following conditions are met:

(1) The person is (i) preparing for the practice of marriage and family therapy in a manner prescribed by rules of the Board, (ii) under qualified supervision in a training institution or facility or supervisory arrangement recognized and approved by the Board, and (iii) designated by a title such as "marriage and family therapy intern," or "marriage and family therapy supervisee," or another similar title approved by the Board.

(2) The person is practicing marriage and family therapy as an employee of a recognized educational institution, or a governmental institution or agency and the practice is included in the duties for which the person was employed by the institution or agency.

(3) The person is practicing marriage and family therapy as an employee of a nonprofit organization which the Board has determined meets community needs and the practice is included in the duties for which the person was employed by the nonprofit organization.

(4) The person is practicing marriage and family therapy as an employee of a hospital licensed under Article 5 of Chapter 131E or Article 2 of Chapter 122C of the General Statutes. Provided, however, no such person shall hold himself out as a licensed marriage and family therapist. (1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994) c. 564, s. 5, made this section effective January 1, 1995.

§ 90-270.48B. Third-party reimbursement.

Nothing in this Article shall be construed to require direct third-party reimbursement to persons licensed under this Article. (1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994) c. 564, s. 5, made this section effective January 1, 1995.

§ 90-270.49. North Carolina Marriage and Family Therapy Licensure Board.

(a) Establishment. — There is established as an agency of the State of North Carolina the North Carolina Marriage and Family Therapy Licensure Board, which shall be composed of seven Board members to be appointed as provided in G.S. 90-270.50. Board members shall be appointed for terms of four years each, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Board member whom he shall succeed. Upon the expiration of a Board member's term of office, the Board member shall continue to serve until a successor has qualified. No person may be appointed more than once to fill an unexpired term or for more than two consecutive full terms. The Governor shall designate one Board member to serve as chairperson of the Board. No person may serve as chairperson for more than four years.

The Governor may remove any member from the Board or remove the chairperson from the position of chairperson only for neglect of duty, malfeasance, or conviction of a felony or crime of moral turpitude while in office.

No Board member shall participate in any matter before the Board in which the member has a pecuniary interest, personal bias, or other similar conflict of interest.

(b) Quorum and Principal Office. — Four of the members of the Board shall constitute a quorum of the Board. The Board shall specify the principal office of the Board within this State.

(c) Repealed by Session Laws 1995 (Reg. Sess., 1994), c. 564, s. 2, effective January 1, 1995. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. —

Session Laws 1993 (Reg. Sess., 1994), c. 564, which amended this section, in s. 3 provides: "All members of the North Carolina Marital and Family Therapy Certification Board shall continue to be members of the North Carolina Marriage and Family Therapy Licensure Board until the expiration of their terms as members of the North Carolina Marital and Family Therapy Certification Board."

Session Laws 1993 (Reg. Sess., 1994), c. 564, which amended this section, in s. 4 provides: "(a) The North Carolina Marriage and Family Therapy Licensure Board shall be considered a continuation of the North Carolina Marital and Family Therapy Certification Board for the purpose of succession to all rights, powers, duties, and obligations of the North Carolina Marital and Family Therapy Certification Board.

"(b) No action or proceeding involving the North Carolina Marital and Family Therapy Certification Board that is pending on the effective date of this act [January 1, 1995] shall be affected by this act. No cause of action arising under this Article before the effective date of this act [January 1, 1995] is affected by this act.

"(c) All rules, regulations, acts, determinations, and decisions of the North

Carolina Marital and Family Therapy Certification Board in force on the effective date of this act [January 1, 1995] shall continue in force as rules, regulations, acts, determinations, and decisions of the North Carolina Marriage and Family Therapy Licensure Board until modified or repealed by the North Carolina Marriage and Family Therapy Licensure Board."

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "Marriage and Family Therapy Licensure" for "Marital and Family Therapy Certification" in the section catchline and in the first sentence of subsection (a); in subsection (a), in the first paragraph, in the first sentence, deleted "hereby," deleted "one of which shall be designated as chairperson" following "members," substituted "as provided" for "in the manner provided for," deleted the former second sentence which read "Of the first Board members appointed, three shall continue in office for two years, two for three years, and two, including the chairperson for four years, respectively," in the present second sentence substituted "Board members" for "Their successors," in the present third sentence substituted "a Board member's" for "his," substituted "the Board member" for "a Board member," and substituted "a successor has" for "his successor shall have been appointed and shall have," in the present fourth sentence inserted "for," in the present fifth sentence deleted "during the term" following "chairperson" and deleted "his appointment to" preceding "the Board," in the second paragraph substituted "from the Board or remove" for "of the Board or," substituted "the position of chairperson only" for "his position as chairperson," substituted "duty, malfeasance, or" for "duty or malfeasance or," deleted "but for no other reason," and in the third paragraph substituted "the member" for "he"; in subsection (b) in the second sentence inserted "Board shall specify the," and substituted "within this State" for "shall be at such location in the State of North Carolina as the Board shall from time to time specify"; and deleted subsection (c) regarding Board employees.

§ 90-270.50. Appointment and qualification of Board members.

(a) Nominations for Appointment. — The Governor shall appoint members of the Board only from among the candidates who meet the following qualifications:

(1) Four members shall be practicing marriage and family therapists who are licensed marriage and family therapists in the State at the time of their appointment, each of whom has been for at least five years immediately preceding appointment actively engaged as a marriage and family therapist in rendering professional services in marriage and family therapy, or in the education and training of graduate or postgraduate students of marriage and family therapy, and has spent the majority of the time devoted to this activity in this State during the two years preceding appointment.

(2) Three members shall be representatives of the general public who have no direct affiliation with the practice of marriage and family therapy.

(b) The appointment of any member of the Board shall automatically terminate 30 days after the date the member is no longer a resident of the State of North Carolina.

(c) The Governor shall fill any vacancy by appointment for the unexpired term.

(d) Each member of the Board must be a citizen of this State and must reside in a different congressional district in this State. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 564, which amended this section, in s. 3 provides: "All members of the North Carolina Marital and Family Therapy Certification Board shall continue to be members of the North Carolina Marriage and Family Therapy Licensure Board until the expiration of their terms as members of the North Carolina Marital and Family Therapy Certification Board."

Session Laws 1993 (Reg. Sess., 1994), c. 564, which amended this section, in s. 4 provides: "(a) The North Carolina Marriage and Family Therapy Licensure Board shall be considered a continuation of the North Carolina Marital and Family Therapy Certification Board for the purpose of succession to all rights, powers, duties, and obligations of the North Carolina Marital and Family Therapy Certification Board.

"(b) No action or proceeding involving the North Carolina Marital and Family Therapy Certification Board that is pending on the effective date of this act [January 1, 1995] shall be affected by this act. No cause of action arising under this Article before the effective date of this act [January 1, 1995] is affected by this act.

"(c) All rules, regulations, acts, determinations, and decisions of the North Carolina Marital and Family Therapy Certification Board in force on the effective date of this act [January 1, 1995] shall continue in force as rules, regulations, acts, determinations, and decisions of the North Carolina Marriage and Family Therapy Licensure Board until modified or repealed by the North Carolina Marriage and Family Therapy Licensure Board."

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, rewrote subdivision (a)(1); substituted "marriage" for "marital" in subdivision (a)(2); substituted "the member" for "such member" in subsection (b); substituted "The Governor shall fill any vacancy" for "If before the expiration of his term any member shall die, resign, become disqualified, or otherwise cease to be a Board member, the vacancy shall be filled by the" in subsection (c); and added subsection (d).

§ 90-270.51. Powers and duties.

(a) The Board shall administer and enforce this Article.

(b) Subject to the provisions of Chapter 150B of the General Statutes, the Board may adopt, amend, or repeal rules to administer and enforce this Article, including rules of professional ethics for the practice of marriage and family therapy.

(c) The Board shall examine and pass on the qualifications of all applicants for licensure under this Article, and shall issue a license to each successful applicant.

(d) The Board may adopt a seal which may be affixed to all licenses issued by the Board.

(e) The Board may authorize expenditures to carry out the provisions of this Article from the fees that it collects, but expenditures may not exceed the revenues of the Board during any fiscal year.

(f) The Board may employ, subject to the provisions of Chapter 126 of the General Statutes, attorneys, experts, and other employees as necessary to perform its duties. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1987, c. 827, s. 78; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. — Session Laws (Reg. Sess., 1994), c. 554, s. 4 provides: "(a) The North Carolina Marital and Family Therapy Licensure Board shall be considered a continuation of the North Carolina Marital and Family Therapy Certification Board for the purpose of succession to all rights, powers, duties, and obligations of the North Carolina Marital and Family Therapy Certification Board.

(b) No action or proceeding involving the North Carolina Marital and Family Therapy Certifcation Board that is pending on the effective date of this act [January 1, 1995] shall be affected by this act. No cause of action arising under this Article before the effective date of this act [January 1, 1995] is affected by this act.

(c) All rules, regulations, acts, determinations, and decisions of the North

Carolina Marital and Family Therapy Certification Board in force on the effective date of this act [January 1, 1995] will continue in force as rules, regulations, acts, determinations, and decisions of the North Carolina Marriage and Family Therapy Licensure Board until modified or repealed by the North Carolina Marriage and Family Therapy Licensure Board."

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "Powers and duties" for "Board meetings" in the section catchline; in subsection (a) deleted "the provisions of" preceding "this Article"; substituted the present language of subsection (b) for "The Board may adopt rules to implement this Article"; in subsection (c) substituted "licensure" for "certificates," substituted "license" for "certificate," and deleted "therefor" from the end; in subsection (d) substituted "licenses" for "certificates"; in subsection (e) deleted "deemed necessary" preceding "to carry," substituted "that it" for "which it," deleted "in no event shall" preceding "expenditures," and inserted "may not"; and added subsection (f).

§ 90-270.52. License application.

(a) Each person desiring to obtain a license under this Article shall apply to the Board upon the form and in the manner prescribed by the Board. Each applicant shall furnish evidence satisfactory to the Board that the applicant:

(1) Is of good moral character;

(2) Has not engaged or is not engaged in any practice or conduct that would be a ground for denial, revocation, or suspension of a license under G.S. 90-270.60;

(3) Is qualified for licensure pursuant to the requirements of this Article.

(b) A license obtained through fraud or by any false representation is void. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, in the section catchline substituted "License" for "Certification"; added the subsection (a) designation; in the introductory language of subsection (a), in the first sentence substituted "license" for "certificate," substituted "apply" for "make application thereof," substituted "the form" for "such form," substituted "prescribed by the Board" for "as the Board shall prescribe and," and in the second sentence added "Each applicant" at the beginning and substituted "the applicant" for "he"; in subdivision (a)(2) substituted "that would" for "which would," added the comma after "revocation," and substituted "license" for "certificate"; in subdivision (a)(3) substitued "licensure" for "certification"; and added subsection (b).

§ 90-270.53: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 564, s. 2, effective January 1, 1995.

§ 90-270.54. Requirements for license.

(a) Each applicant shall be issued a license by the Board if the applicant meets the qualifications set forth in G.S. 90-270.52(a) and provides satisfactory evidence to the Board that the applicant:

(1) Meets educational and experience qualifications as follows:

a. Educational requirements: Possesses a minimum of a master's degree from a recognized educational institution in the field of marriage and family therapy, or a degree in an allied mental health field, which degree is evidenced by the applicant's official transcripts which establish that the applicant has completed an appropriate course of study in an allied mental health field. An applicant with a degree in an allied mental health field may meet the educational requirements if the applicant presents satisfactory evidence of post-master's or post-doctoral training taken in the field of marriage and family therapy from a program recognized by the Board regardless whether the training was taken at a nondegree granting institution or in a nondegree program, as long as the training, by itself or in combination with any other training, is the equivalent in content and quality, as defined in the rules of the Board, of a master's or doctoral degree in marriage and family therapy;

b. Experience requirements: Has at least 1,500 hours of clinical experience in the practice of marriage and family therapy, not more than 500 hours of which were obtained while the candidate was a student in a master's degree program and at least 1,000 of which were obtained after the applicant was granted a degree in the field of marriage and family therapy or an allied mental health field (with ongoing supervision consistent with standards approved by the Board); and

(2) Passes an examination administered by the Board.

(b) Any person who is a certified marriage and family therapist on January 1, 1995, shall be deemed to be a licensed marriage and family therapist as of that date. Valid and unexpired certificates operate as licenses for the purposes of this Article until the date set for renewal of the certificate, at which time the Board shall issue the certificate holder a license in accordance with G.S. 90-270.58. (1979, c. 697, s. 1; 1981, c. 611, s. 2; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "Requirements for license" for "Application for certificate by examination" in the section catchline; added the subsection (a) designation; in the introductory language of subsection (a) substituted "Each applicant" for "Any person who applies to the Board after January 1, 1981," substituted "license" for "certificate," substituted "the applicant" for "he" twice, substituted "G.S. 90-270.52(a)" for "subdivisions (1), (2), and (3) of G.S. 90-270.52"; rewrote subdivision (a)(1); in subdivision (a)(2) substituted "an examination" for "a written and/or oral examination"; and added subsection (b).

§ 90-270.55. Examinations.

The Board shall conduct an examination at least once a year at a time and place designated by the Board. Examinations may be written, oral, or both as determined by the Board. Examinations shall include questions in theoretical and applied fields to test an applicant's knowledge and competence to engage in the practice of marriage and family therapy. The Board shall set the passing score for examinations. Any person who fails an examination conducted by the Board shall not be admitted to a subsequent examination for a period of at least six months. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "Examinations" for "Examination" in the section catchline; deleted the former subsection designations; in the second sentence substituted "written, oral, or both" for "written or oral"; in the third sentence deleted "such" preceding "theoretical" and substituted "marriage" for "marital"; and substituted the present fourth sentence for "An applicant shall be held to have passed an examination upon affirmative vote of a majority of the members of the Board present and voting."

§ 90-270.55A. Temporary license.

The Board shall issue a nonrenewable temporary license to a person applying for licensure under G.S. 90-270.54 for a period not to exceed the lesser of one year or the date next scheduled for issuance of new licenses pursuant to G.S. 90-270.54 upon a finding that the person substantially meets the education and experience requirements of G.S. 90-270.54(a)(1). No temporary license shall be issued to a person who has failed an examination administered under G.S. 90-270.55. Recipients of temporary licenses have all the rights, duties, and obligations of permanent licensees, except that the Board shall limit by rule the practice of marriage and family therapy by temporary licensees. (1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994) c. 564, s. 5, made this section effective January 1, 1995.

§ 90-270.56. Reciprocal licenses.

The Board shall issue a license by reciprocity to any person who applies for the license as prescribed by the Board and who is licensed or certified as a marriage and family therapist in another state whose requirements for the license or certificate are equivalent to or exceed the requirements of this State. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, in the section catchline substituted "licenses" for "certificates"; substituted "license" for "certificate," inserted "who applies for the license as prescribed by the Board and who is," substituted "marriage" for "marital," and deleted from the end "provided the applicant submits an application on forms prescribed by the Board and pays the original certification fee prescribed by this Article."

§ 90-270.57. Fees.

In order to fund the Board's activities under this Article, the Board may charge and collect fees not exceeding the following:

(1) Each license examination	$50.00
(2) Each license application	150.00
(3) Each renewal of license	100.00
(4) Each reciprocal license application	150.00
(5) Each reinstatement of an expired license	125.00
(6) Each application to return to active status	125.00.

In addition to the examination fee provided in subdivision (1) of this section, the Board may charge and collect from each applicant for license examination the cost of test materials.

The Board is authorized to return all or a portion of fees paid in cases where the applicant is ineligible or in cases of undue hardship. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1989, c. 581, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, rewrote this section.

§ 90-270.58. Renewal of license.

All licenses issued under this Article shall expire automatically on the first day of July of each year. The Board shall renew a license upon (i) completion of the continuing education requirements of G.S. 90-270.58B and (ii) payment of the renewal fee. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1989, c. 581, s. 2; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "license" for "certificate" in the section catchline, and rewrote the section.

§ 90-270.58A. Reinstatement after expiration.

A person whose license has expired may have the license reinstated as prescribed by the Board. The Board shall charge and collect a fee for reinstatement of the license. (1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994) c. 564, s. 5 made this section effective January 1, 1995.

§ 90-270.58B. Inactive status.

(a) A person who holds a valid and unexpired license and who is not actively engaged in the practice of marriage and family therapy may apply to the Board to be placed on inactive status. A person on inactive status shall not be required to pay annual renewal fees.

(b) A person on inactive status shall not practice or hold himself out as practicing marriage and family therapy or perform any other activities prohibited by this Article.

(c) A person desiring to return to active status shall submit written application to the Board. The Board shall return the person to active status upon payment of the fee specified in G.S. 90-270.57 and upon such showing of competency to resume practice as the Board may require. (1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994) c. 564, s. 5 made this section effective January 1, 1995.

§ 90-270.58C. Continuing education requirements.

The Board shall prescribe continuing education requirements for licensees. These requirements shall be designed to maintain and improve the quality of professional services in marriage and family therapy provided to the public, to keep the licensee knowledgeable of current research, techniques, and practice, and to provide other resources that will improve skill and competence in marriage and family therapy. The number of hours of continuing education shall not exceed the number of hours available that year in Board-approved courses within the State. The Board may waive these continuing education requirements for not more than 12 months, but only upon the licensee's satisfactory showing to the Board of undue hardship. (1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994) c. 564, s. 5 made this section effective January 1, 1995.

§ 90-270.59. Disposition of funds.

All moneys received by the Board shall be used to implement this Article. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, deleted "fees and other" preceding "moneys," deleted "collected and" preceding "received," and substituted "to implement" for "for the purpose of implementing."

§ 90-270.60. Denial, revocation, or suspension of license.

(a) Grounds for Denial, Revocation, or Suspension. — The Board may deny, revoke, or suspend a license granted pursuant to this Article on any of the following grounds:

(1) Conviction of a felony under the laws of the United States or of any state of the United States.

(2) Conviction of any crime, an essential element of which is dishonesty, deceit, or fraud.

(3) Fraud or deceit in obtaining a license as a marriage and family therapist.

(4) Dishonesty, fraud or gross negligence in the practice of marriage and family therapy.

(5) Violation of any rule of professional ethics and professional conduct adopted by the Board.

(b) Any disciplinary action taken shall be in accordance with Chapter 150B of the General Statutes. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1987, c. 827, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, in the section catchline added the comma after "revocation" and substituted "license" for "certification"; in the introductory language of subsection (a) substituted "may deny, revoke" for "is authorized to deny, revoke," substituted "license" for "certificate," and inserted "any of"; in subdivision (a)(3) substituted "license as a marriage" for "certificate as a certified marital"; in subdivision (a)(4) substituted "marriage" for "marital"; in subsection (b) deleted "the provisions of" preceding "Chapter"; and made stylistic changes.

§ 90-270.61. Penalties.

Any person not licensed as a marriage and family therapist under this Article who engages in the practice of marriage and family therapy, or holds himself or herself out to be a marriage or family therapist or engaged in marriage and family therapy in violation of this Article is guilty of a Class 2 misdemeanor. (1979, c. 697, s. 1; 1985, c. 223, ss. 1, 1.1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, rewrote this section.

§ 90-270.62. Injunction.

As an additional remedy, the Board may proceed in a superior court to enjoin and restrain any person without a valid license from violating the prohibitions of this Article. The Board shall not be required to post bond to such proceeding. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, deleted "uncertified" preceding "person," and inserted "without a valid license."

ARTICLE 18D.

Occupational Therapy.

§ 90-270.79. (Effective October 1, 1994 — See editor's note) Violation a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 20.

Nursing Home Administrator Act.

§ 90-288. (Effective October 1, 1994 — See editor's note) Misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides:

"This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 22.

Licensure Act for Speech and Language Pathologists and Audiologists.

§ 90-294. License required; Article not applicable to certain activities.

(a) Licensure shall be granted in either speech and language pathology or audiology independently. A person may be licensed in both areas if qualified in both areas.

(b) **(Effective until July 1, 1995)** No person may practice or hold himself out as being able to practice speech and language pathology or audiology in this State unless such person holds a current, unsuspended, unrevoked license issued by the Board as provided in this Article. The license required by this section shall be kept conspicuously posted in such person's office or place of business at all times. Nothing in this Article, however, shall be construed to prevent a qualified person licensed in this State under any other law from engaging in the profession or occupation for which such person is licensed.

(b) **(Effective July 1, 1995)** No person may practice or hold himself or herself out as being able to practice speech and language pathology or audiology in this State unless the person holds a current, unsuspended, unrevoked license issued by the Board or is registered with the Board as an assistant. The license required by this section shall be kept conspicuously posted in the person's office or place of business at all times. Nothing in this Article, however, shall be construed to prevent a qualified person licensed in this State under any other law from engaging in the profession or occupation for which such person is licensed.

(c) The provisions of this Article do not apply to:

(1) The activities, services and use of an official title by a person employed by an agency of the federal government and solely in connection with such employment.

(2) The activities and services of a student or trainee in speech and language pathology or audiology pursuing a course of study in an accredited college or university, or working in a training center program approved by the Board, if these activities and services constitute a part of such person's course of study.

(3) Repealed by Session Laws 1987, c. 665, s. 2.

(4) A person who holds a valid and current credential as a speech and language pathologist or audiologist issued by the North Carolina Department of Public Instruction or who is employed by the North Carolina Schools for the

Deaf and Blind, if such person practices speech and language pathology or audiology in a salaried position solely within the confines or under the jurisdiction of the Department of Public Instruction or the Department of Human Resources respectively.

(5) A physician licensed to practice medicine.

(6) Persons performing audiometric screenings and whose work is under the supervision of a licensed physician, or licensed audiologist.

(7) Persons who are now or may become engaged in counseling or instructing laryngectomees in the methods, techniques, or problems of learning to speak again.

(8) Individuals licensed under Chapter 93D of the General Statutes.

(d) Nothing in this Article shall apply to a physician licensed to practice medicine, or to any person employed by such a physician in the course of his practice of medicine.

(e) This Article shall not be construed to prevent any person licensed in this State under Chapter 93D of the General Statutes of North Carolina from the practice of fitting and selling hearing aids.

(f) The provisions of this Article do not apply to registered nurses and licensed practical nurses or other certified technicians trained to perform audiometric screening tests and whose work is under the supervision of a physician, consulting physician, or licensed audiologist.

(g) The provisions of this Article do not apply to persons who are now or may become engaged in counseling or instructing laryngectomees in the methods, techniques or problems of learning to speak again.

(h) No license under this Article is required for persons originally employed by any agency of State government between October 1, 1975, and July 1, 1977, for the practice of speech and language pathology or audiology within and during the course and scope of employment with such agency. (1975, c. 773, s. 1; 1977, c. 692, s. 3; 1981, c. 572, ss. 1, 2; 1987, c. 665, s. 2; 1989, c. 770, s. 17; 1993 (Reg. Sess., 1994), c. 688, s. 1.)

Subsection (b) set out twice. — The first version of subsection (b) set out above is effective until July 1, 1995. The second version of subsection (b) set out above is effective July 1, 1995.

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective July 1, 1995, in subsection (b) inserted "or herself," substituted "the" for "such" preceding "person" and "person's," and substituted "or is registered with the Board as an assistant" for "as provided in this Article."

§ 90-298.1. (Effective July 1, 1995) Registered assistant.

A licensed speech and language pathologist or a licensed audiologist may register with the Board an assistant who works under the licensee's supervision if all of the following requirements are met:

(1) The assistant meets the qualifications for registered assistants adopted by the Board.

(2) The licensee who supervises the assistant pays the registration fee set by the Board.

§ 90-298.1 has a delayed effective date. See notes.

A registration of an assistant must be renewed annually. To renew the registration of an assistant, the licensee who supervises the assistant must submit an application for renewal and pay the renewal fee. An initial or renewal fee for registering an assistant may not exceed the renewal license fee set under G.S. 90-305. (1993 (Reg. Sess., 1994), c. 688, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 688, s. 3, makes this section effective July 1, 1995.

§ 90-306. (Effective October 1, 1994 — See editor's note) Penalty for violation.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 24.

Licensed Professional Counselors Act.

§ 90-332.1. Exemptions from licensure.

(a) It is not the intent of this Article to regulate members of other regulated professions who do counseling in the normal course of the practice of their profession. Accordingly, this Article does not apply to:

(1) Lawyers licensed under Chapter 84, doctors licensed under Chapter 90, and any other person registered, certified, or licensed by the State to practice any other occupation or profession while rendering counseling services in the performance of the occupation or profession for which the person is registered, certified, or licensed.

(2) Any school counselor certified by the State Board of Education while counseling within the scope of employment by a board of education or private school.

(3) Any student intern or trainee in counseling pursuing a course of study in counseling in a regionally accredited institution of higher learning or training institution, if the intern or trainee is a designated "counselor intern" and the activities and services constitute a part of the supervised course of study.

(4) Any person counseling as a supervised counselor in a supervised professional practice under G.S. 90-336(b)(2).

(4.1) Any person counseling within the scope of employment at a local community college.

(4.2) Any person counseling within the scope of employment at a private higher education institution as defined in G.S. 116-22(1).

(5) Any ordained minister or other member of the clergy while acting in a ministerial capacity who does not charge a fee for the service, or any person invited by a religious organization to conduct, lead, or provide counseling to its members when the service is not performed for more than 30 days a year.

(6) Any nonresident temporarily employed in this State to render counseling services for not more than 30 days in a year, if the person holds a license or certificate required for counselors in another state.

(7) Any person employed by State, federal, county, or municipal government while counseling within the scope of employment.

(8) Any person performing counseling solely as an employee of an area facility, as defined in G.S. 122C-3(14)a., if both of the following apply:

a. The services are provided by (i) a qualified professional as defined in G.S. 122C-3(31) and subject to the rules adopted by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, or (ii) an employee supervised by a qualified professional as defined in G.S. 122C-3(31);

b. The area facility has obtained written verification from the following boards that the employee has not had his or her license, registration, or certification revoked, rescinded, or suspended: the North Carolina Board of Licensed Professional Counselors, the North Carolina State Board of Examiners of Practicing Psychologists, the North Carolina Certification Board for Social Work, and the North Carolina Marital and Family Therapy Certification Board;

(9) Any person performing counseling as an employee of a hospital or other health care facility licensed under Chapter 131D, 131E, or 122C who is performing this counseling under the supervision of a qualified professional as defined in G.S. 122C-3(31); and

(10) Any employee assistance professional providing core-specific employee assistance program (EAP) activities, as defined by the Employee Assistance Professionals Association Standards for Employee Assistance Programs Part II: Professional Guidelines (1988).

(b) Persons who claim to be exempt under subsection (a) of this section are prohibited from advertising or offering themselves as "licensed professional counselors".

(c) Persons licensed under this Article are exempt from rules pertaining to counseling adopted by other occupational licensing boards.

(d) Nothing in this Article shall prevent a person from performing substance abuse counseling or substance abuse prevention consulting as defined in Article 5C of this Chapter. (1993, c. 514, s. 1; 1993 (Reg. Sess., 1994), c. 591, ss. 12, 16(a), 16(b); c. 685, s. 2.)

Editor's Note. —

The North Carolina Marital and Family Therapy Certification Board, referred to above, is now the North Carolina Marriage and Family Therapy Licensure Board. See §§ 90-270.45 et seq.

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 591, ss. 12 and 16, effective July 1, 1994, added subdivisions (a)(4.1) and (a)(4.2); in subdivision (a)(8), in the introductory language deleted "mental health" preceding "counseling"; and in subdivision (a)(8)a. deleted "mental health" preceding "services," inserted "(i)," deleted "mental health" preceding "professional" and substituted "as defined in G.S. 122C-3(31) and subject to the rules adopted by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, or (ii) an employee supervised by a qualified professional as defined in G.S. 112C-3(31)" for "who meets or exceeds the minimum educational qualifications for licensure as a licensed professional counselor under this Article"; substituted the semicolon for a period at the end of subdivision (a)(8); and added subdivisions (a)(9) and (a)(10).

Session Laws 1993 (Reg. Sess., 1994), c. 685, s. 2, effective July 1, 1994, and applicable to requirements imposed on or after that date, and to causes of action, whether civil, criminal, or administrative, arising on or after that date, added subsection (d).

§ 90-338. Exemptions.

Applicants holding certificates of registration as Registered Practicing Counselors and in good standing with the Board shall be issued licenses as licensed professional counselors without meeting the requirements of G.S. 90-336(b). The following applicants shall be exempt from the academic qualifications required by this Article for licensed professional counselors and shall be licensed upon passing the Board examination and meeting the experience requirements:

(1) An applicant who was engaged in the practice of counseling before July 1, 1993.

(2) An applicant who holds a masters degree from a college or university accredited by one of the regional accrediting associations or from a college or university determined by the Board to have standards substantially equivalent to a regionally accredited institution, provided the applicant was enrolled in the masters program prior to July 1, 1994. (1983, c. 755, s. 1; 1993, c. 514, s. 1; 1993 (Reg. Sess., 1994), c. 685, s. 3; c. 769, s. 25.19.)

Editor's Note. —

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 685, s. 3, effective July 1, 1994, substituted "or" for "and" preceding "meeting the experience requirements"; however, the legislature changed this word back to "and" in c. 769, s. 25.19.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 25.19, effective July 1, 1994, capitalized "practicing" in the first sentence and substituted "and" for "or" preceding "meeting" in the second sentence.

§ 90-341. (Effective October 1, 1994 — See editor's note) Violation a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 25.

Dietetics/Nutrition.

§ 90-366. (Effective October 1, 1994 — See editor's note) Violation a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 26.

Fee-Based Practicing Pastoral Counselors.

§ 90-390. Refusal, suspension, or revocation of a certificate.

(a) A certificate applied for or issued under this Article may be refused, suspended, revoked, or otherwise limited as provided in subsection (e) of this section by the Board upon proof that the applicant or person to whom a certificate was issued:

(1) Has been convicted of a felony;

(2) Has been convicted of a misdemeanor involving moral turpitude, misrepresentation or fraud in dealing with the public, or an offense relevant to fitness to practice certified fee-based pastoral counseling;

(3) Has engaged in fraud or deceit in securing or attempting to secure a certificate or the renewal of a certificate or has willfully concealed from the Board material information in connection with application for or renewal of a certificate under this Article;

(4) Is a habitual drunkard or is addicted to deleterious habit-forming drugs;

(5) Has made fraudulent or misleading statements pertaining to his education, licensure, professional credentials, or related to his qualification or fitness for the practice of pastoral counseling;

(6) Has had a license for the practice of pastoral counseling in any other state or any other country suspended or revoked;

(7) Has been guilty of unprofessional conduct as defined by the relevant code of ethics published by the American Association of Pastoral Counselors; or

(8) Has violated any provision of this Article or the rules of the Board.

(b) A certificate issued under this Article shall be automatically suspended by the Board after failure to renew a certificate for a period of more than three months after the annual renewal date.

(c) Except as otherwise provided in this Article, the procedure for revocation, suspension, refusal, or other limitations of the certificate shall be in accordance with the provisions of Chapter 150B of the General Statutes. In any proceeding or record of any hearing before the Board, and in any complaint or notice of charges against any certified fee-based pastoral counselor or certified fee-based pastoral counseling associate and in any decision rendered by the Board, the Board shall endeavor to withhold from public disclosure the identity of any counselees or clients who have not consented to the public disclosure of treatment by the certified fee-based pastoral counselor or certified fee-based pastoral counseling associate. The Board may close a hearing to the public and receive in a closed session evidence concerning the treatment or delivery of pastoral counseling services to a counselee or a client who has not consented to public disclosure of treatment or services, as may be necessary for the protection of the counselee's or client's rights and the full presentation of relevant evidence. All records, papers, and documents containing information collected and compiled by or on behalf of the Board as a result of investigations, inquiries, or interviews conducted in connection with certification or disciplinary matters are not public records within the meaning of Chapter 132 of the General Statutes. However, any notice or statement of charges against any certified fee-based pastoral counselor or certified fee-based pastoral counseling associate, any notice to any certified fee-based pastoral counselor or certified fee-based pastoral counseling associate of a hearing in any proceeding, or any decision rendered in connection with a hearing in any proceeding is a public record within the meaning of Chapter 132 of the General Statutes, except that identifying information concerning the treatment or delivery of services to a counselee or client who has not consented to the public disclosure of such treatment or services may be deleted. Any record, paper, or other document containing information collected and compiled by or on behalf of the Board, as provided in this section, that is received and admitted in evidence in any hearing before the Board shall be a public record within the meaning of Chapter 132 of the General Statutes, subject to any deletions of identifying information concerning the treatment or delivery of pastoral counseling services to a counselee or client who has not consented to public disclosure of the treatment or services.

(d) The Board may reinstate a suspended certificate upon payment by an applicant of a fee of twenty dollars ($20.00), and may require that the applicant file a new application, submit to reexamination for reinstatement, and pay other authorized fees as required by the Board.

(e) Upon proof that a certified fee-based pastoral counselor or certified fee-based pastoral counseling associate certified under this Article has engaged in any of the prohibited actions specified in subsection (a) of this section, the Board may, in lieu of refusal, suspension, or revocation, do any one or more of the following:

(1) Issue a formal reprimand;
(2) Formally censure the certified fee-based pastoral counselor or certified fee-based pastoral counseling associate;
(3) Place the certified fee-based pastoral counselor or certified fee-based pastoral counseling associate on probation with any conditions the Board may deem advisable; or
(4) Limit or circumscribe the professional pastoral counseling services provided by the certified fee-based pastoral counselor or the certified fee-based pastoral counseling associate as the Board deems advisable.

(f) The Board may impose conditions of probation or restrictions on continued practice at the conclusion of a period of suspension or as a condition for the restoration of a revoked or suspended certificate. In lieu of or in connection with any disciplinary proceedings or investigation, the Board may enter into a consent order relating to the discipline, censure, proceeding costs, probation, or limitations on the practice of a certified fee-based pastoral counselor or certified fee-based pastoral counseling associate. (1991, c. 670, s. 1; 1993 (Reg. Sess., 1994), c. 570, s. 8.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 570, s. 12 provides that the amendment to this section by c. 570, s. 8 shall not affect pending litigation.

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, substituted "a closed session" for "executive session" in the third sentence of subsection (c). For applicability of the amendment, see the editor's note.

ARTICLE 27.

Referral Fees and Payment for Certain Solicitations Prohibited.

§ 90-400. Definition.

Editor's Note. —

Session Laws 1993 (Reg. Sess., 1994), c. 689, s. 1, effective October 1, 1994, substituted "Referral Fees and Payment of Certain Solicitations Prohibited" for "Runners Prohibited" as the title of this Article.

Session Laws 1993 (Reg. Sess., 1994), c. 689, s. 5, is a severability clause.

§ 90-401. Referral fees and payment for certain solicitations prohibited.

A health care provider shall not financially compensate in any manner a person, firm, or corporation for recommending or securing the health care provider's employment by a patient, or as a reward for having made a recommendation resulting in the health care provider's employment by a patient. No health care provider who refers a patient of that health care provider to another health care provider shall receive financial or other compensation from the health care provider receiving the referral as a payment solely or primarily for the referral. This section shall not be construed to prohibit a health care provider's purchase of advertising which does not entail direct personal contact or telephone contact of a potential patient. (1991 (Reg. Sess., 1992), c. 858, s. 1; 1993 (Reg. Sess., 1994), c. 689, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 689, s. 5, is a severability clause.

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, substituted "Referral fees and payment for certain solicitations" for "Runners" in the catchline to this section; added the second sentence; and in the third sentence substituted "section" for "provision," and substituted "which does not entail direct personal contact or telephone contact of a potential patient" for "from a bona fide mass media outlet."

§ 90-401.1. Direct solicitation prohibited.

It shall be unlawful for a health care provider or the provider's employee or agent to initiate direct personal contact or telephone contact with any injured, diseased, or infirmed person, or with any other person residing in the injured, diseased, or infirmed person's household, for a period of 90 days following the injury or the onset of the disease or infirmity, if the purpose of initiating the contact, in whole or in part, is to attempt to induce or persuade the injured, diseased, or infirmed person to become a patient of the health care provider. This section shall not be construed to prohibit a health care provider's use of posted letters, brochures, or information packages to solicit injured, diseased, or infirmed persons, so long as such use does not entail direct personal contact with the person. (1993 (Reg. Sess., 1994), c. 689, s. 3.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 689, s. 6, made this section effective October 1, 1994.

Session Laws 1993 (Reg. Sess., 1994), c. 689, s. 5, is a severability clause.

§ 90-402. Sanctions.

Violation of the provisions of this Article shall be grounds for the offending health care provider's licensing board to suspend or revoke the health care provider's license, to refuse to renew the health care provider's license, or to take any other disciplinary action authorized by law. (1991 (Reg. Sess., 1992), c. 858, s. 1; 1993 (Reg. Sess., 1994), c. 689, s. 4.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 689, s. 5, is a severability clause.

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective October 1, 1994, substituted "the provisions of this Article" for "G.S. 90-401."

ARTICLE 29.

Medical Records.

§ 90-411. Record copy fee.

A health care provider may charge a reasonable fee to cover the costs incurred in searching, handling, copying, and mailing medical records to the patient or the patient's designated representative. The maximum fee shall be fifty cents (50) per page, provided that the health care provider may impose a minimum fee of up to ten dollars ($10.00), inclusive of copying costs. If requested by the patient or the patient's designated representative, nothing herein shall limit a reasonable professional fee charged by a physician for the review and preparation of a narrative summary of the patient's medical record. This section shall only apply with respect to liability claims for personal injury, except that charges for medical records and reports related to claims under Article 1 of Chapter 97 of the General Statutes shall be governed by the fees established by the North Carolina Industrial Commission pursuant to G.S. 97-26.4. (1993, c. 529, s. 4.3; 1993 (Reg. Sess., 1994), c. 679, s. 5.5.)

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 5.5, "The Workers' Compensation Reform Act of 1994," effective September 1, 1994, and applicable to claims pending on or filed after that date, added "except that charges for medical records and reports related to claims under Article 1 of Chapter 97 of the General Statutes shall be governed by the fees established by the North Carolina Industrial Commission pursuant to G.S. 97-26.4" at the end of the last sentence.

ARTICLE 30.

Practice of Acupuncture.

§ 90-452. Practice of acupuncture without license prohibited.

(a) Unlawful Acts. — It is unlawful to engage in the practice of acupuncture without a license issued pursuant to this Article. It is unlawful to advertise or otherwise represent oneself as qualified or authorized to engage in the practice of acupuncture without having the license required by this Article. A violation of this subsection is a Class 1 misdemeanor.

(b) Exemptions. — This section shall not apply to any of the following persons:

(1) A physician licensed under Article 1 of this Chapter.
(2) A student practicing acupuncture under the direct supervision of a licensed acupuncturist as part of a course of study approved by the Board.
(3) A chiropractor licensed under Article 8 of this Chapter. (1993, c. 303, s. 1; 1994, Ex. Sess., c. 14, s. 48.)

Editor's Note. — Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor punishable by imprisonment for up to two years, a fine, or both" in subsection (a).

Chapter 90A.

Sanitarians and Water and Wastewater Treatment Facility Operators.

Article 4.

Registrations of Sanitarians.

Sec.

90A-53. Qualifications and examination for registration as a sanitarian.

Sec.

90A-66. (Effective October 1, 1994 — See editor's note) Violations; penalty; injunction.

ARTICLE 4.

Registrations of Sanitarians.

§ 90A-53. Qualifications and examination for registration as a sanitarian.

The Board shall issue certificates to qualified persons as registered sanitarians. A certificate as a registered sanitarian shall be issued to any person upon the Board's determination that such person:

(1) Has made application to the Board on a form prescribed by the Board;

(2) Is of good moral character;

(3) **(Effective until January 1, 1996)** Has received a baccalaureate degree from a post-secondary educational institution rated as acceptable by the Board with a minimum of 20 semester hours or its equivalent in the physical and/or biological sciences;

(3) **(Effective January 1, 1996 until January 1, 1998)** Has received a baccalaureate degree from a post-secondary educational institution rated as acceptable by the Board with a minimum of 25 semester hours or its equivalent in the physical and/or biological sciences;

(3) **(Effective January 1, 1998)** Has received a baccalaureate degree from a post-secondary educational institution rated as acceptable by the Board with a minimum of 30 semester hours or its equivalent in the physical and/or biological sciences;

(4) Has satisfactorily completed a course in specialized instruction and training approved by the Board which course shall be designed as to content and so administered as to present sufficient knowledge of the needs properly to be served by public health sanitation, the elements of good environmental health sanitation, the laws and regulations governing sanitation in environmental health and the protection of the public health;

(5) Has had at least two years' experience in the field of environmental health as defined in this Article. Provided, however, that only one year of experience in the field of environmental health as defined in this Article is required of a sanitarian intern who is a graduate of a bachelor's or mas-

ter's degree program that is accredited by the National Accreditation Council for Environmental Health Curricula of the National Environmental Health Association.

(6) Has passed an examination administered by the Board designed to test for competence in the subject matters of environmental health sanitation. The examination shall be in a form prescribed by the Board and may be oral, written, or both. The examination for applicants shall be held annually or more frequently as the Board may by rule prescribe, at a time and place to be determined by the Board. A person shall not be registered if such person fails to meet the minimum grade requirements for examination specified by the Board. Failure to pass an examination shall not prohibit such person from being examined at subsequent times and places as specified by the Board; and

(7) Has paid a fee set by the Board not to exceed the cost of the examination. (1959, c. 1271, s. 6; 1981 (Reg. Sess., 1982), c. 1274, s. 2; 1989, c. 545, s. 2; 1993, c. 233, ss. 1-3.)

Subdivision (3) Set Out Three Times. — The first version of subdivision (3) as set out above is effective until January 1, 1996. The second version of subdivision (3) as set out above is effective January 1, 1996 until January 1, 1998. The third version of subdivision (3) as set out above is effective January 1, 1998.

Effect of Amendments. — Session Laws 1993, c. 233, s. 1, effective January 1, 1994, and applicable to applications for registration received on or after that date, substituted "20" for "15" in subdivision (3).

Session Laws 1993, c. 233, s. 2, effective January 1, 1996, and applicable to applications for registration received on or after that date, substituted "25" for "20" in subdivision (3).

Session Laws 1993, c. 233, s. 3, effective January 1, 1998, and applicable to applications for registration received on or after that date, substituted "30" for "25" in subdivision (3).

§ 90A-66. (Effective October 1, 1994 — See editor's note) Violations; penalty; injunction.

Any person violating any of the provisions of this Article or of the rules and regulations adopted by the Board shall be guilty of a Class 1 misdemeanor. The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this Article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. Actions under this section shall be commenced in the superior court district or set of districts as defined in G.S. 7A-41.1 in which the respondent resides or has his principal place of business or in which the alleged acts occurred. (1959, c. 1271, s. 13; 1981 (Reg. Sess., 1982), c. 1274, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 104; 1993, c. 539, s. 653; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and punishable in the discretion of the court" in the first sentence.

Chapter 90B.

Social Worker Certification Act.

Sec.
90B-10. Exemption from certain requirements.
90B-12. (Effective October 1, 1994 — See editor's note) Violation a misdemeanor.

§ 90B-1. Short title.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 90B-10. Exemption from certain requirements.

(a) Applicants who were engaged in the practice of social work before January 1, 1984, shall be exempt from the academic qualifications required by this act for Certified Social Workers and Certified Social Work Managers and shall be certified upon passing the Board examination and meeting the experience requirements, if any, for certification of persons in that classification.

(b) The following may engage in clinical social work practice without meeting the requirements of G.S. 90B-7(d):

(1) A person who has engaged in clinical social work practice for one year prior to the effective date of this act and who properly applies for and pays the required fees for a certificate as a certified clinical social worker prior to January 1, 1993. Notwithstanding the foregoing provision of this subdivision, any applicant who applied for certification pursuant to this subdivision between December 1, 1993, and January 15, 1994, and who is otherwise eligible for certification under this subdivision but for the January 1, 1993, deadline shall be certified.

(2) A student completing a clinical requirement for graduation while pursuing a course of study in social work in an institution accredited by or in candidacy status with the Council on Social Work Education.

(3) An employee engaged in clinical social work practice exclusively for one of the following employers:

a. **(Effective until January 1, 1997)** The State, a political subdivision of the State, or a local government.

b. A hospital or health care facility licensed pursuant to Article 2 of Chapter 122C of the General Statutes or Articles 5 and 6 of Chapter 131E of the General Statutes. (1983, c. 495, s. 1; 1991, c. 732, s. 5; 1993 (Reg. Sess., 1994), c. 745, s. 38.1.)

Editor's Note. —

Session Laws 1991, c. 732, s. 8 provides: "G.S. 90B-10(b)(3)a. is repealed effective January 1, 1997."

Effect of Amendments. —

The 1993 (Reg. Sess., 1994) amendment, effective July 15, 1994, in subdivision (b)(1) added the second sentence.

§ 90B-12. (Effective October 1, 1994 — See editor's note) Violation a misdemeanor.

Any person violating any provision of this Chapter is guilty of a Class 2 misdemeanor. (1983, c. 495, s. 1; 1993, c. 539, s. 654; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and, upon conviction thereof, may be punishable by fine not exceeding two hundred dollars ($200.00) for the first offense and five hundred dollars ($500.00) for each subsequent offense, by imprisonment of not more than six months, or by both such fine and imprisonment."

Chapter 90C.

Therapeutic Recreation Personnel Certification Act.

Sec.
90C-7. Executive Director.

§ 90C-1. Short title.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 90C-7. Executive Director.

The Executive Director shall deposit all fees payable to the Board in financial institutions designated by the Board as official depositories. The funds shall be deposited in the name of the Board and shall be used to pay all expenses incurred by the Board in carrying out the purposes of this Chapter. (1985 (Reg. Sess., 1986), c. 966, s. 1; 1987, c. 23, s. 1; 1993, c. 257, s. 6.)

Effect of Amendments. — The 1993 amendment, effective July 1, 1993, deleted the last sentence, which read "The Board shall be audited annually by the State Auditor."

Chapter 91A.

Pawnbrokers Modernization Act of 1989.

Sec.
91A-11. Penalties.

§ 91A-1. Short title.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 91A-11. Penalties.

(a) **(Effective October 1, 1994 — See editor's note)** Every person, firm, or corporation, their guests or employees, who shall knowingly violate any of the provisions of this Chapter, shall, on conviction thereof, be deemed guilty of a Class 2 misdemeanor. If the violation is by an owner or major stockholder or managing partner of the pawnshop and the violation is knowingly committed by the owner, major stockholder, or managing partner of the pawnshop, then the license of the pawnshop may be suspended at the discretion of the court.

(b) The provision of subsection (a) shall not apply to violations of G.S. 91A-10(6) which shall be prosecuted under the North Carolina criminal statutes.

(c) Any contract of pawn the making or collecting of which violates any provision of this Chapter, except as a result of accidental or bona fide error of computation, shall be void, and the licensee shall have no right to collect, receive or retain any interest or fee whatsoever with respect to such pawn. (1989, c. 638, s. 2; 1993, c. 539, s. 655; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor, and shall be fined a sum not to exceed five hundred dollars ($500.00) for each offense, and at the discretion of the court, may be imprisoned for a period of time not to exceed six months" in the first sentence of subsection (a).

Chapter 93.

Certified Public Accountants.

§ 93-1. Definitions; practice of law.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 93-13. (Effective October 1, 1994 — See editor's note) Violation of Chapter; penalty.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 93A.

Editor's Note. — The legislation and annotations affecting Chapter 93A have been included in a recently published replacement chapter.

Chapter 93D.

North Carolina State Hearing Aid Dealers and Fitters Board.

Sec.
93D-6. Persons selling in other jurisdictions.
93D-15. (Effective October 1, 1994 — See editor's note) Violation of Chapter.

§ 93D-1. Definitions.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 93D-6. Persons selling in other jurisdictions.

Whenever the Board determines that another state or jurisdiction has requirements at least equivalent to those in effect pursuant to this Chapter for the fitting and selling of hearing aids, and that such state or jurisdiction has a program at least equivalent to the program for determining whether applicants pursuant to this Chapter are qualified to sell and fit hearing aids, the Board may issue, but is not compelled to issue, licenses to applicants therefor who hold current, unsuspended and unrevoked certificates or licenses to fit and sell hearing aids in such other state or jurisdiction. No such applicant shall be required to submit to any examination or other procedure required by G.S. 93D-5, but shall be required to pay an application fee to the Board in an amount set by the Board, not to exceed one hundred fifty dollars ($150.00). Such applicant must have one full year of experience satisfactory to the Board before issuance of the license. (1969, c. 999; 1971, c. 1093, s. 2; 1981, c. 990, s. 2; 1991, c. 592, s. 3; 1991 (Reg. Sess., 1992), c. 1030, s. 24.)

Effect of Amendments. —
The 1991 (Reg. Sess., 1992) amendment, effective July 24, 1992, deleted "a" preceding "an application fee" in the next to last sentence.

§ 93D-15. (Effective October 1, 1994 — See editor's note) Violation of Chapter.

Any person who violates any of the provisions of this Chapter and any person who holds himself out to the public as a fitter and seller of hearing aids without having first obtained a license or apprenticeship registration as provided for herein shall be deemed guilty of a Class 2 misdemeanor. (1969, c. 999; 1981, c. 601, s. 20; 1993, c. 539, s. 660; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor and upon conviction shall be punished by a fine of not more than one thousand dollars ($1,000) nor less than five hundred dollars ($500.00) or imprisonment for not more than six months, or both, in the discretion of the court."

Chapter 93E.

North Carolina Appraisers Act.

Article 1.

Real Estate Appraiser.

Sec.
93E-1-13. Penalty for violation of this Chapter.

ARTICLE 1.

Real Estate Appraiser.

§ 93E-1-1. Title.

Editor's Note. — Session Laws 1989, c. 536 added Article 5, Real Estate Appraisers, §§ 93A-70 through 93A-81 effective July 1, 1990 and provided that the North Carolina Real Estate Commission shall have authority to adopt rules reasonably necessary to implement that act.

§ 93E-1-13. Penalty for violation of this Chapter.

(a) Any person who acts as, or holds himself out to be, a State-licensed or State-certified real estate appraiser without first obtaining a license or certificate as provided in this Chapter, or who willfully performs the acts specified in G.S. 93E-1-12(a)(1) through (10), shall be guilty of a Class 1 misdemeanor.

(b) The Board may appear in its own name in superior court in actions for injunctive relief to prevent any person from violating the provisions of this Chapter or the rules promulgated by the Board. The superior court shall have the power to grant these injunctions whether or not criminal prosecution has been or may be instituted as a result of the violations, and whether or not the person is the holder of a license or certificate issued by the Board under this Chapter. (1993, c. 419, s. 6; 1994, Ex. Sess., c. 14, s. 49.)

Editor's Note. — Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1994 Extra Session amendment, effective on the same date that Chapter 539 of the 1993 Session Laws becomes effective (October 1, 1994), and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and shall be punished by a fine or imprisonment, or by both, in the discretion of the court" in subsection (a).

Chapter 94.

Apprenticeship.

§ 94-6. Definition of an apprentice.

CASE NOTES

Cited in Varnell v. Henry M. Milgrom, Inc., 78 N.C. App. 451, 337 S.E.2d 616 (1985).

Chapter 95.

Department of Labor and Labor Regulations.

Article 5A.

Regulation of Private Personnel Services.

Sec.
95-47.4. Contracts; contents; approval; tying contracts forbidden.
Sec.
95-47.7. Private Personnel Service Advisory Council.
95-48 through 95-53. [Repealed.]

ARTICLE 2A.

Wage and Hour Act.

§ 95-25.1. Short title and legislative purpose.

CASE NOTES

Claim for Unpaid Bonus. — Plaintiff's state claims presented complex and unsettled issues of North Carolina law which would be more appropriately resolved by a North Carolina court including the proper definition of "handicapped person" under § 143-422.2, part of the North Carolina Equal Employment Practices Act; and the proper analysis of this act, with its accompanying administrative regulations in the North Carolina Administrative Code, in the context of the plaintiff's claim for an unpaid bonus. McCullough v. Branch Banking & Trust Co., 844 F. Supp. 258 (E.D.N.C. 1993).

§ 95-25.2. Definitions.

Legal Periodicals. — For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

§ 95-25.21. (See editor's note for date change) Illegal acts.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 3.

Various Regulations.

§ 95-28. (Effective October 1, 1994 — See editor's note) Working hours of employees in State institutions.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 95-28.2. Discrimination against persons for lawful use of lawful products during nonworking hours prohibited.

Legal Periodicals. — For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

ARTICLE 5A.

Regulation of Private Personnel Services.

§ 95-47.4. Contracts; contents; approval; tying contracts forbidden.

(a) A contract between a private personnel service and an applicant shall be in writing, labeled as a contract, physically separate from any application and made in duplicate. One copy shall be given to the applicant and the other shall be kept by the private personnel service as required by G.S. 95-47.5(2).

(b) Any contract that obligates an applicant to pay a fee to the private personnel service shall include:

(1) The name, address and telephone number of the private personnel service;

(2) The name of the applicant;

(3) The date the contract was signed;

(4) A clear schedule of the fees to be charged to the applicant at various salary levels;

(5) A clear explanation of when the applicant becomes obligated to pay a fee;

(6) A clear refund policy (or no refund policy) that conforms to the requirements of G.S. 95-47.4(f) and (g);

(7) If the applicant is obligated whether or not the applicant accepts employment, a clear explanation of the services provided and a statement that the private personnel service does not guarantee that the applicant will obtain employment as a result of its services;

(8) A statement, in a type size no smaller than nine point, directly above the place for the applicant's signature, that reads as follows: "I have read and received a copy of this CONTRACT, which I understand makes me legally obligated to pay a fee under conditions outlined above." In the preceding statement the word "CONTRACT" and no others shall be in all capitals; and

(9) A statement that the private personnel service is licensed and regulated by the Commissioner and the address at which a copy of laws and regulations governing private personnel services may be obtained.

(c) A copy of each contract form to be used with applicants shall be filed with the Commissioner. Until the private personnel service receives written notification from the Commissioner that the form conforms to the requirements of this Article and regulations adopted hereunder, it shall not be used with applicants.

(d) A private personnel service shall not require an applicant to sign a contract with the private personnel service before the applicant has had an opportunity to read the contract and discuss the contract with an employee of the personnel agency who regularly arranges contacts and assists in negotiations between employers and applicants. A private personnel service shall not coerce an applicant into signing a contract by applying or using duress, undue influence, fraud or misrepresentation sufficient to invalidate the contract under North Carolina law.

(e) Any contract that obligates an applicant to pay a fee to the private personnel service when the applicant accepts employment shall be physically separate from any contract that obligates an applicant to pay a fee whether or not the applicant accepts employment. A private personnel service shall not require an applicant to sign one contract as a prerequisite to signing another contract or to pay a fee as a prerequisite to signing a contract. Express violations of this subsection are the following:

(1) Refusal to allow an applicant to contract for counseling, job information or resume writing services, if the applicant does not agree to pay an additional fee upon acceptance of employment; and

(2) Refusal to allow an applicant to contract for services which obligate the applicant only upon acceptance of employment, if the applicant does not agree to pay a registration fee or to contract for counseling, resume writing or other services.

(f) If a private personnel service has a refund policy, included on each contract that obligates an applicant upon acceptance of employment will be a statement defining:

(1) The length of the period of time covered by the refund policy;

(2) The exact manner of computing the refund so that the amount of refund due the applicant will be clear;

(3) The conditions under which a refund becomes due to the applicant. The conditions of the refund, if other than unconditional policy is used, shall contain a definition of the reasons for which a refund will not be made. A refund will not be denied except for a reason so stated in the definition of the contract;

(4) A personnel service shall abide by the refund policy stated on its contract by promptly paying to applicants any refund due under the terms of the contract.

(g) If a private personnel service has no refund policy, the private personnel service shall include on each contract that obligates an applicant upon acceptance of employment, in a type size no smaller than nine point, a statement that reads as follows:

"................. (name of private personnel service) will make NO REFUND under any circumstances of fees paid by the applicant." In the preceding statement the words NO REFUND and no others shall be in all capitals.

(h) If a private personnel service places an applicant in a position of employment, the compensation of which is based, in whole or in part, on commission, the private personnel service shall:

(1) Have a written job order from the employer that includes the anticipated earnings upon which the private personnel service may base its fee, or

(2) In lieu of the written job order required by subdivision (1) of this subsection, have a policy of providing the same fee reimbursement as may be available to applicants from employers under the provisions of G.S. 95-47.3A.

In no case may the applicant collect the same reimbursement from both the employer and the private personnel service. When the private personnel service elects to obtain the written job order from the employer and not have its own reimbursement policy as described in subdivision (2) of this subsection, the private personnel service shall explain to the applicant and the employer how the fee for the placement is calculated, and shall inform in writing both the applicant and the employer of the provisions of G.S. 95-47.3A governing fee refunds from employers. (1979, c. 780, s. 1; 1991 (Reg. Sess., 1992), c. 970, s. 2; 1993, c. 202, s. 1; 1993 (Reg. Sess., 1994), c. 769, s. 29(a).)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, which amended this section, in s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective July 16, 1994, substituted "above" for "below" in the first sentence of subdivision (b)(8).

§ 95-47.7. Private Personnel Service Advisory Council.

(a) There is hereby established the North Carolina Private Personnel Service Advisory Council. The Council shall be composed of 12 members appointed by the Commissioner. Each member of the Council shall be domiciled in this State for at least three years immediately preceding his appointment and be of good moral character. At least five members shall have occupied for at least three years immediately preceding their appointment, and shall occupy at the time of appointment, executive or managerial positions in the private personnel service industry in North Carolina; and at least three shall have occupied, for at least three years immediately preceding their appointment, executive or managerial positions as personnel officers in companies which regularly utilize the services of private personnel services in obtaining employees. Members of the Council shall serve without salary, but shall be paid per diem, subsistence, and travel allowance in accordance with Chapter 138 of the General Statutes.

(b) Each member of the Council shall hold office until the appointment and qualification of his successor. The terms of the initial members of the Council shall expire as follows: four members, July 1, 1980; four members, July 1, 1981; four members, July 1, 1982. Subsequent appointments shall be made for terms of three years. Vacancies occurring in the membership of the Council for any cause shall be filled by appointment for the balance of the unexpired term. The Commissioner may remove any member of the Council for misconduct, incompetency, neglect of duty, or other good cause.

(c) The Council shall meet at least once in each calendar quarter of each year. All meetings of the Council shall be open and public and all records of the Council shall be open to inspection, except as otherwise prescribed by law. Seven members shall constitute a quorum for the transaction of business. The Council shall elect from its members, each for term of one year, a chairman and vice-chairman, and may appoint such committees as it deems necessary to carry out its duties. The Commissioner or his designee shall serve ex officio as the secretary of the Council, but shall not be a member of the Council. (1979, c. 780, s. 1; 1993 (Reg. Sess., 1994), c. 769, s. 29(b).)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, which amended this section, in s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective July 16, 1994, added "but shall be paid per diem, subsistence, and travel allowance in accordance with Chapter 138 of the General Statutes" in the last sentence of subsection (a).

§ 95-47.9. (See editor's note for date change) Enforcement of Article; rules; hearing; penalty; criminal penalties.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 6.

Separate Toilets for Sexes.

§§ 95-48 through 95-53: Repealed by Session Laws 1993, c. 204, s. 1, effective June 23, 1993.

Editor's Note. — Session Laws 1993, c. 204, s. 1 repealed this Article, effective June 23, 1993. Repealed G.S. 95-50 was also amended by Session Laws 1993, c. 539, s. 664, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), effective October 1, 1994. Because of the repeal of this section, the amendment is not set out.

ARTICLE 7A.

Uniform Boiler and Pressure Vessel Act.

§ 95-69.18. (Effective October 1, 1994 — See editor's note) Inspection certificates required; misrepresentation as inspector.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 9.

Earnings of Employees in Interstate Commerce.

§ 95-75. (Effective October 1, 1994 — See editor's note) Remedies for violation of § 95-73 or 95-74; damages; indictment.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 12.

Public Employees Prohibited from Becoming Members of Trade Unions or Labor Unions.

§ 95-98. Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.

Legal Periodicals. — For survey of developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

§ 95-99. (Effective October 1, 1994 — See editor's note) Penalty for violation of Article.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 13.

Payments to or for Benefit of Labor Organizations.

§ 95-104. (Effective October 1, 1994 — See editor's note) Penalty.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 14A.

Elevator Safety Act of North Carolina.

§ 95-110.11. (Effective October 1, 1994 — See editor's note) Violations; criminal penalties.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 15.

Passenger Tramway Safety.

§ 95-124. (Effective October 1, 1994 — See editor's note) Suspension of registration.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 16.

Occupational Safety and Health Act of North Carolina.

§ 95-127. Definitions.

CASE NOTES

Cited in Brooks v. Ansco & Assocs., 114 N.C. App. 711, 443 S.E.2d 89 (1994).

§ 95-128. Coverage.

Legal Periodicals. — For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

§ 95-130. Rights and duties of employees.

Legal Periodicals. —

For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

§ 95-139. (Effective October 1, 1994 — See editor's note) Criminal penalties.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 95-148. Safety and health programs of State agencies and local governments.

Legal Periodicals. — For comment, "From Andrews to Woodson and Beyond: The Development of the Intentional Tort Exception to the Exclusive Remedy Provision—Rescuing North Carolina Workers from Treacherous Waters," see 20 N.C. Cent. L.J. 164 (1992).

ARTICLE 18.

Identification of Toxic or Hazardous Substances.

Part 2. Public Safety and Emergency Response Right to Know.

§ 95-194. (See editor's note for date change) Emergency information.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 95-197. (See editor's note for date change) Withholding hazardous substance trade secret information.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 21.

Retaliatory Employment Discrimination.

§ 95-240. Definitions.

Legal Periodicals. —

For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

§ 95-241. Discrimination prohibited.

CASE NOTES

Treatment of Similarly Situated Employees. — In an employee discharge case instituted pursuant to former § 97-6.1 (see now this section), evidence of the employer's treatment of similarly situated employees is admissible to show the employer's motive for discharging the employee. Abels v. Renfro Corp., 335 N.C. 209, 436 S.E.2d 822 (1993).

ARTICLE 22.

Safety and Health Programs and Committees.

§ 95-250. Definitions.

Legal Periodicals. — For comment, "From Andrews to Woodson and Beyond: The Development of the Intentional Tort Exception to the Exclusive Remedy Provision—Rescuing North Carolina Workers from Treacherous Waters," see 20 N.C. Cent. L.J. 164 (1992).

Chapter 96.

Employment Security.

Article 2.

Unemployment Insurance Division.

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96-8. Definitions.
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96-21. Duties concerning veterans and worker profiling.

ARTICLE 1.

Employment Security Commission.

§ 96-2. Declaration of State public policy.

CASE NOTES

Quoted in Watson v. Employment Sec. Comm'n, 111 N.C. App. 410, 432 S.E.2d 399 (1993).

§ 96-4. Administration.

CASE NOTES

Quoted in State ex rel. Employment Sec. Comm'n v. IATSE Local 574, 114 N.C. App. 662, 442 S.E.2d 339 (1994).

ARTICLE 2.

Unemployment Insurance Division.

§ 96-8. Definitions.

As used in this Chapter, unless the context clearly requires otherwise:

(1) "Benefits" means the money payments payable to an individual, as provided in this Chapter, with respect to his unemployment.

(2) "Commission" means the Employment Security Commission established by this Chapter.

(3) "Contributions" means the money payments to the State Unemployment Insurance Fund required by this Chapter.

(4) "Employing unit" means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person which has or had in its

employ one or more individuals performing services for it within this State. All individuals performing services within this State for any employing unit which maintains two or more separate establishments within this State shall be deemed to be employed by a single employing unit for all the purposes of this Chapter. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this Chapter unless such agent or employee is an employer subject to the tax imposed by the Federal Unemployment Tax Act, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of such work: Provided, however, that nothing herein, on or after July 1, 1939, shall be construed to apply to that part of the business of such "employers" as may come within the meaning of that term as it is defined in section one (a) of the Railroad Unemployment Insurance Act.

(5) "Employer" means:

a. Any employing unit which (a) within the current or preceding calendar year, and which for some portion of a day in each of 20 different calendar weeks within such calendar year (whether or not such weeks are or were consecutive), has or had in employment one or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week); or (b) in any calendar quarter in either the current or preceding calendar year paid for service in employment wages of one thousand five hundred dollars ($1,500) or more. Provided further, for the purpose of this paragraph, "employment" shall include services which would constitute "employment" but for the fact that such services are deemed to be performed entirely within another state pursuant to an election under an arrangement entered into by the Commission pursuant to subsection (*l*) of G.S. 96-4, and an agency charged with the administration of any other state or federal employment security law. Provided further, for the purpose of this paragraph, "week" means a period of seven consecutive calendar days, and when a calendar week falls partly within each of two calendar years, the days of that week up to January 1 shall be deemed one calendar week, and the days beginning January 1, another such week.

b. Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this Chapter, or which acquired a part of the organization, trade, or business of another, which at the time of such acquisition was an employer subject to this Chapter; provided, such other would have been an employer under paragraph a of this subdivision if such part had constituted its entire organization, trade, or business; provided further, that G.S. 96-10, subsection (d), shall not be applicable to an individual or employing unit acquiring such part of the organization, trade or business. The provisions of G.S. 96-11(a) to the contrary notwithstanding, any employing unit which becomes an employer solely by virtue of the provisions of this paragraph shall not be liable for contributions based on wages paid or payable to individuals with respect to employment performed by such individuals for such employing unit prior to the date of acquisition of the organization, trade, business, or a part thereof as specified herein, or substantially all the assets of another, which at the time of such acquisition was an employer subject to this Chapter. This provision shall not be applicable with respect to any employing unit which is an employer by reason of any other provision of this Chapter. A successor by total acquisition under the provisions of this paragraph may be relieved from coverage hereunder by making written application with the Commission within 60 days from the date the Commission mails him a notification of his liability and provided the Commission finds the predecessor was an employer at the time of such acquisition only because such predecessor had failed to make application for termination of coverage as provided in G.S. 96-11 of this Chapter. A successor under the provisions of this paragraph who becomes an employer by virtue of having acquired a part of the organization, trade or business of the predecessor hereunder may be relieved from coverage upon making written application with the Commission within 60 days from the date the Commission mails him a notification of his liability and the Commission finds that the predecessor could have terminated by making the application under G.S. 96-11 if the part acquired had constituted all of the predecessor's business.

c. Repealed by Session Laws 1985, c. 552, s. 1.

d. Any employing unit which, having become an employer under paragraphs a or b, has not, under G.S. 96-11, ceased to be an employer subject to this Chapter; or

e. For the effective period of its election pursuant to G.S. 96-11(c) any other employing unit which has elected to become fully subject to this Chapter.

f. Any employing unit not an employer by reason of any other paragraph of this subdivision, for which within any calendar year, services in employment are or were performed with respect to which such employing unit is or was liable for any federal tax against which credit may or could have been taken for contributions required to be paid into a State Unemployment Insurance Fund; or which as a condition for approval of this Chapter for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required, pursuant to such act, to be an "employer" under this Chapter; or any employing unit required to be covered by the Federal Unemployment Tax Act; provided, that such employer, notwithstanding the provisions of G.S. 96-11, shall cease to be subject to the provisions of this Chapter during any calendar year if the Commission finds that during such period the employer was not subject to the provisions of the Federal Unemployment Tax Act and any other provision of this Chapter.

g. Repealed by Session Laws 1985, c. 552, s. 2.

h. Any employing unit which maintains an operating office within this State from which the operations of an American vessel operating on navigable waters within or within and without the United States or ordinarily and regularly supervised, managed, directed, and controlled: Provided, the employing unit would be an employer by reason of any other paragraph of this subdivision.

i. Repealed by Session Laws 1985, c. 552, s. 3.

j. Prior to January 1, 1978, any institution of higher education or State hospital located in this State which is an agency or instrumentality of this State, or which is owned or operated by the State or an instrumentality of this State (or by this State and one or more states or their instrumentalities), provided such employing unit, in each of 20 different calendar weeks within the current or preceding calendar year (whether or not such weeks are or were consecutive), has or had in employment one or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week), or in any calendar quarter in either the current or preceding calendar year paid for services in employment wages of one thousand five hundred dollars ($1,500) or more.

For purposes of this Chapter, "institution of higher education" means an educational institution in this State which: (i) admits as regular students only individuals having a certificate of graduation from a high school or the recognized equivalent of such certificate; (ii) is legally authorized in this State to provide a program of education beyond high school; (iii) provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for credit toward such a degree or a program of training to prepare students for gainful employment in a recognized occupation; (iv) is a public or other nonprofit institution; and (v) notwithstanding any of the foregoing provisions of this subdivision, is a university, college, or community college in the State.

For purposes of this Chapter, "State hospital" means any institution licensed by the Department of Human Resources under Chapter 122C or Chapter 131E of the General Statutes.

k. Notwithstanding any other provision of this Chapter, any nonprofit organization or a group of organizations (hereafter, where the words "nonprofit organization" are used in this Chapter, it shall include a group of nonprofit organizations), corporations, any community chest, fund, or foundation which are organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals and which is [are] exempt or may be exempted from federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954, provided such employing unit for some portion of a day in each of 20 different calendar weeks within the current or preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment four or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week).

l. Repealed by Session Laws 1981, c. 160, s. 5.

m. Repealed by Session Laws 1981, c. 160, s. 6.

n. With respect to employment on and after January 1, 1978, any person or employing unit who (a) during any calendar quarter in the current calendar year or the preceding calendar year paid wages of twenty thousand dollars ($20,000) or more for agricultural labor, or (b) on each of some 20 days during the current or preceding calendar year, each day being in a different calendar week, employed at least 10 individuals in employment in agricultural labor for some portion of the day. Provided, that with respect to agricultural labor performed by a crew on and after January 1, 1978, the crew leader shall be deemed an employer if (1) either of the requirements set forth in the first sentence of this paragraph are met; and (2) the crew members are not employed by another person within the meaning of the first sentence of this paragraph; (3) and if the crew leader holds a valid certificate of registration under the Migrant and Seasonal Agricultural Worker Protection Act; or substantially all the members of the crew operate or maintain tractors, mechanized harvesting or crop dusting equipment, or any other mechanized equipment, which is provided by the crew leader. For purposes of this paragraph, the term "crew leader" means an individual who (1) furnishes individuals to perform agricultural labor for any other person, (2) pays (either on his behalf or on behalf of such other person) the individuals so furnished by him for the agricultural labor performed by them, and (3) has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person. The farm operator shall be deemed to be the employer of any worker hired by the farm operator; any assignment to work with a crew or under a crew leader notwithstanding. All the workers shall be deemed the employees of the farm operator when the crew leader does not qualify as the employer under the provisions set out in this paragraph.

o. With respect to employment on and after January 1, 1978, any person who during any calendar quarter in the current calendar year or the preceding calendar year paid wages in cash of one thousand dollars ($1,000) or more for domestic service in a private home, local college club, or local chapter of a college fraternity or sorority.

p. With respect to employment on and after January 1, 1978, any state and local governmental employing unit, including the State of North Carolina, a county board of education, a city board of education, the State Board of Education, the Board of Trustees of The University of North Carolina, the board of trustees of other institutions and agencies supported and under the control of the State, any other agency of and within the State by which a teacher or other employee is paid, and any county, incorporated city or town, the light and water board or commission of any incorporated city or town, the board of alcoholic control of any county or incorporated city or town, county and/or city airport authorities, housing authorities created and operated under and by virtue of Chapter 157 of the General Statutes, redevelopment commissions created and operated under and by virtue of Article 22, Chapter 160A of the General Statutes, county and/or city or regional libraries, county and/or city boards of health, district boards of health, any other separate, local governmental entity, jointly owned or operated governmental entities, and the Retirement System.

q. With respect to employment on and after January 1, 1978, any nonprofit elementary and secondary school. For purposes of this Chapter, "secondary school" means any school not an institution of higher education as defined in G.S. 96-8(5)j.

r. An employee service company which is an employing unit is the employer of an individual who is engaged in employment performing services for a client or customer of the employee service company if the employee service company is taxed under the Federal Unemployment Tax Act (26 U.S.C. § 3301 to § 3311) on the basis of that employment. For purpose of this Chapter, "employee service company" means a leasing company or temporary help service which contracts with clients or customers to supply individuals to perform services for the client or customer and which, both under contract and in fact:

1. Negotiates with clients or customers for such matters as time, place, type of work, working conditions, quality, and price of the services;
2. Determines assignments or reassignments of individuals to its clients or customers, even if the individuals retain the right to refuse specific assignments;
3. Sets the rate of pay of the individuals, whether or not through negotiation;

4. Pays the individuals from its account or accounts; and
5. Hires and terminates individuals who perform services for the clients or customers.

(6) a. "Employment" means service performed including service in interstate commerce, except employment as defined in the Railroad Retirement Act and the Railroad Unemployment Insurance Act, performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term "employee" includes an officer of a corporation, but such term does not include (i) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (ii) any individual (except an officer of a corporation) who is not an employee under such common-law rules. An employee who is on paid vacation or is on paid leave of absence due to illness or other reason shall be deemed to be in employment irrespective of the failure of such individual to perform services for the employing unit during such period.

b. The term "employment" shall include an individual's entire service, performed within or both within and without this State if:

1. The service is localized in this State; or
2. The service is not localized in any state but some of the service is performed in this State, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.
3. The service, wherever performed, is within the United States, or Canada; such service is not covered under the unemployment compensation law of any other state or Canada; and the place from which the service is directed or controlled is in this State.

c. Services performed within this State but not covered under paragraph b of this subdivision shall be deemed to be employment subject to this Chapter, if contributions are not required and paid with respect to such services under an employment security law of any other state or of the federal government.

d. Services not covered under paragraph b of this subdivision, and performed entirely without this State, with respect to no part of which contributions are required and paid under an employment security law of any other state or of the federal government, shall be deemed to be employment subject to this Chapter if the individual performing such service is a resident of this State and the Commission approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this Chapter, and services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to subsection (*l*) of G.S. 96-4 shall be deemed to be employment during the effective period of such election.

e. Service shall be deemed to be localized within a state if:

1. The service is performed entirely within such state; or
2. The service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the State, for example, is temporary or transitory in nature or consists of isolated transactions.

f. The term "employment" shall include:

1. Services covered by an election pursuant to G.S. 96-11, subsection (c), of this Chapter; and
2. Services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to G.S. 96-4, subsection (*l*), of this Chapter during the effective period of such election.
3. Any service of whatever nature performed by an individual for an employing unit on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if such individual is employed on and in connection with such vessel when outside the United States: Provided, such service is performed on or in connection with the operations of an American vessel operating on navigable waters within or within and without the United States and such operations are ordinarily and regularly supervised, managed, directed, and controlled from an operating office maintained by the employing unit in this State: Provided further, that this subparagraph shall not be applicable to those services excluded in subdivision (6), paragraph k, subparagraph 6 of this section.
4. Any service of whatever nature performed by an individual for an employing unit on or in connection with an American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the aircraft it touches at a port in the United States, if such individual is employed on and in connection with such aircraft when outside the United States; provided such service is performed on or in connec-

tion with the operations of an American aircraft and such operations are ordinarily and regularly supervised, managed, directed, and controlled from an operating office maintained by the employing unit in this State.

5. Notwithstanding any other provision of this Chapter, "employment" shall include any individual who performs services irrespective of whether the master-servant relationship exists, for remuneration for any employing unit:
   (a) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk) or laundry or dry-cleaning services, for his principal;
   (b) As a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations if the contract of services contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employment" under the provisions of this subsection if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for whom the services are performed.

6. Service of an individual who is a citizen of the United States, performed outside of the United States (except in Canada), in the employ of an American employer (other than service which is deemed "employment" under the provisions of paragraph b or e of this subsection or the parallel provisions of another state's law), if:
   (i) The employer's principal place of business in the United States is located in this State; or
   (ii) The employer has no place of business in the United States, but
      (I) The employer is an individual who is a resident of this State; or
      (II) The employer is a corporation which is organized under the laws of this State; or
      (III) The employer is a partnership or a trust and the number of the partners or trustees who are residents of this State is

greater than the number who are residents of any other state; or

(iii) None of the criteria of divisions (i) and (ii) of this subparagraph is met but the employer has elected coverage in this State, or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under the law of this State.

(iv) An "American employer," for the purposes of this paragraph, means a person who is:

(I) An individual who is a resident of the United States; or

(II) A partnership if two thirds or more of the partners are residents of the United States; or

(III) A trust, if all of the trustees are residents of the United States; or

(IV) A corporation organized under the laws of the United States or of any state;

(V) For the purposes of this subparagraph, United States includes all the states, the District of Columbia, and the Commonwealth of Puerto Rico.

7. Services with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a State unemployment insurance fund, or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under this Chapter.

g. On and after January 1, 1978, the term "employment" includes services performed in agricultural labor when a person or employing unit (a) during any calendar quarter in the current calendar year or the preceding calendar year pays wages of twenty thousand dollars ($20,000) or more for agricultural labor, or (b) on each of some 20 days during the preceding calendar year, each day being in a different calendar week, employs at least 10 individuals in employment in agricultural labor for some portion of the day. For purposes of this Chapter, the term "agricultural labor" includes all services performed: (1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife; (2) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm; (3) in connection with the production or harvesting of crude gum (oleoresin) from a living tree, and the following products if processed by the original producer of crude gum from which derived; gum spirits of turpentine and gum resin, or in connection with the ginning of cotton or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes; or (4)(A) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if such operator produced more than one half of the commodity with respect to which such service is performed; (B) in the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in performance of service described in subparagraph (A), but only if such operators produced more than one half of the commodity with respect to which such service is performed. (C) The provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; (D) on a farm operated for profit if such service is not in the course of the employer's trade or business. As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. Provided, such labor is not agricultural labor performed before January 1, 1995, by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act.

h. On and after January 1, 1978, the term "employment" includes domestic service in a private home, local college club or local chapter of a college fraternity or sorority performed for a person who pays cash remuneration of one thousand dollars ($1,000) or more on or after January 1, 1978, in any calendar quarter in the current calendar year or the preceding calendar year to individuals employed in such domestic service.

i. On and after January 1, 1978, the term "employment" includes service performed for any State and local governmental employing unit. Provided, however, that employment shall not include service performed (a) as an elected official; (b) as a member of a legislative body or a member of the judiciary, of a State or political subdivision thereof; (c) as a member of the State

National Guard or Air National Guard; (d) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; or (e) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week. The services to which clause (d) of the preceding sentence applies include but are not limited to temporary emergency services compensated solely by a fixed payment for each emergency call answered whether or not provided for by prior agreement and training in preparation for such temporary emergency service whether or not compensated.

j. On and after January 1, 1978, the term "employment" includes services performed in any calendar year by employees of nonprofit elementary and secondary schools.

k. The term "employment" shall not include:

1, 2. Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 680, s. 7, effective July 5, 1994.

3. Service with respect to which unemployment insurance is payable under an employment security system established by an act of Congress: Provided, that the Commission is hereby authorized and directed to enter into agreements with the proper agencies under such act of Congress, which agreements shall become effective 10 days after publication thereof in the manner provided in G.S. 96-4(b) for general rules, to provide potential rights to benefits under this Chapter, acquired rights to unemployment insurance under act of Congress, or who have, after acquiring potential rights to unemployment insurance, under such act of Congress, acquired rights to benefits under this Chapter.

4, 5. Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 680, s. 7, effective July 5, 1994.

6. Service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft by an individual if the individual is performing services on and in connection with such vessel or aircraft when outside the United States; or, service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by such individual as an ordinary incident to any such activity), except (i) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and (ii) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the regis-

tered tonnage of merchant vessels under the laws of the United States).

7. Services performed by an individual in the employ of a son, daughter, or spouse; services performed by a child under the age of 21 in the employ of his father or mother or of a partnership consisting only of parents of the child.
8. Service performed by an individual during any calendar quarter for any employing unit or an employer as an insurance agent or as an insurance solicitor, or as a securities salesman if all such service performed during such calendar quarter by such individual for such employing unit or employer is performed for remuneration solely by way of commission; service performed by an individual for an employing unit as a real estate agent or a real estate salesman as defined in G.S. 93A-2, provided, that such real estate agent or salesman is compensated solely by way of commission and is authorized to exercise independent judgment and control over the performance of his work.
9. Services performed in employment as a newsboy or newsgirl selling or distributing newspapers or magazines on the street or from house to house.
10. Except as provided in G.S. 96-8(6)f5(a), service covered by an election duly approved by the agency charged with the administration of any other state or federal employment security law in accordance with an arrangement pursuant to subdivision (*l*) of G.S. 96-4 during the effective period of such election.
11. Casual labor not in the course of the employing unit's trade or business.
12. Service in any calendar quarter in the employ of any organization exempt from income tax under the provisions of section 501(a) of the Internal Revenue Code of 1954 (other than an organization described in section 401(a) of said Internal Revenue Code of 1954) or under section 521 of the Internal Revenue Code of 1954, if the remuneration for such service is less than fifty dollars ($50.00).
13. Service in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled and is regularly attending classes at such school, college, or university, or (ii) by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such employment will not be covered by any program of unemployment insurance.
14. Service performed by an individual who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty

and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers.

15. Services performed (i) in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or (ii) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or (iii) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work; or (iv) as a part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving such work relief or work training, unless a federal law, rule or regulation mandates unemployment insurance coverage to individuals in a particular work-relief or work-training program; (v) after December 31, 1971, by an inmate for a hospital in a State prison or other State correctional institution or by a patient in any other State-operated hospital, and services performed by patients in a hospital operated by a nonprofit organization shall be exempt; (vi) after December 31, 1971, in the employ of a hospital, if such service is performed by a patient of such hospital; (vii) after December 31, 1971, by an inmate of a custodial or penal institution.
16. Notwithstanding the provisions of G.S. 96-8(6)f3 and 96-8(6)k6, service performed by an individual on a boat engaged in catching fish or other forms of aquatic animal life under the arrangement with the owner or operator of such boat pursuant to which:

(A) Such individual does not receive any cash remuneration (other than as provided in subparagraph (B)),

(B) Such individual receives a share of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life or a share of the proceeds from the sale of such catch, and

(C) The amount of such individual's share depends on the amount of the boat's (or the boats' in the case of a fishing operation involving more than one boat) catch of fish or other forms of aquatic animal life,

but only if the operating crew of such boat (or each boat from which the individual receives a share in the case of a fishing operation involving more than one boat) is normally made up of fewer than 10 individuals. In order to preserve the State's right to collect State unemployment taxes for which a credit against federal unemployment taxes may be taken for contributions paid into a State unemployment insurance fund, this paragraph 16 shall not apply, with respect to any individual, to service during any period for which an assessment for federal unemployment taxes is made by the Internal Revenue Service pursuant to the Federal Unemployment Tax Act which assessment becomes a final determination (as defined by section 1313 of the Internal Revenue Code of 1954 as amended).

17. Services performed by an inmate of the North Carolina prison system on work release.

18. Service performed by a full-time student in the employ of an organized camp

(A) If such camp:

(I) Did not operate for more than seven months in the calendar year and did not operate for more than seven months in the preceding calendar year; or

(II) Had average gross receipts for any six months in the preceding calendar year which were not more than thirty-three and one-third percent ($33^{1}/_{3}\%$) of its average gross receipts for the other six months in the preceding calendar year; and

(B) If the full-time student performed services in the employ of such camp for less than 13 calendar weeks in the calendar year.

As used in this sub-subdivision, an individual shall be treated as a full-time student for any period:

(A) During which the individual is enrolled as a full-time student at an educational institution; or

(B) Which is between academic years or terms if:
   (I) The individual was enrolled as a full-time student at an educational institution for the immediately preceding academic year or term; and
   (II) There is a reasonable assurance that the individual will be so enrolled for the immediately succeeding academic year or term after the period described in sub-subparagraph (I) of this subparagraph.

(7) "Employment office" means a free public employment office, or branch thereof, operated by this State or maintained as a part of a state-controlled system of public employment offices.

(8) "Fund" means the Unemployment Insurance Fund established by this Chapter, to which all contributions required and from which all benefits provided under this Chapter shall be paid.

(8a) "Reemployment services" means job search assistance and job placement services, such as counselling, testing, assessment, and providing occupational and labor market information, job search workshops, job clubs, referrals to employers, and other similar services.

(9) "State" includes, in addition to the states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(10) Total and partial unemployment.
   a. For the purpose of establishing a benefit year, an individual shall be deemed to be unemployed:
      1. If he has payroll attachment but, because of lack of work during the payroll week for which he is requesting the establishment of a benefit year, he worked less than the equivalent of three customary scheduled full-time days in the establishment, plant, or industry in which he has payroll attachment as a regular employee. If a benefit year is established, it shall begin on the Sunday preceding the payroll week ending date.
      2. If he has no payroll attachment on the date he reports to apply for unemployment insurance. If a benefit year is established, it shall begin on the Sunday of the calendar week with respect to which the claimant met the reporting requirements provided by Commission regulation.
   b. For benefit weeks within an established benefit year, a claimant shall be deemed to be:
      1. Totally unemployed, irrespective of job attachment, if his earnings for such week, including payments defined in subparagraph c below, would not reduce his weekly benefit amount as prescribed by G.S. 96-12(c).
      2. Partially unemployed, if he has payroll attachment but because of lack of work during the payroll week for which he is requesting benefits he worked less than three customary scheduled full-time days in the establishment, plant, or industry

in which he is employed and whose earnings from such employment (including payments defined in subparagraph c below) would qualify him for a reduced payment as prescribed by G.S. 96-12(c).

3. Part-totally unemployed, if the claimant had no job attachment during all or part of such week and whose earnings for odd jobs or subsidiary work (including payments defined in subparagraph c below) would qualify him for a reduced payment as prescribed by G.S. 96-12(c).

c. No individual shall be considered unemployed if, with respect to the entire calendar week, he is receiving, has received, or will receive as a result of his separation from employment, remuneration in the form of (i) wages in lieu of notice, (ii) accrued vacation pay, (iii) terminal leave pay, (iv) severance pay, (v) separation pay, or (vi) dismissal payments or wages by whatever name. Provided, however, if such payment is applicable to less than the entire week, the claimant may be considered to be unemployed as defined in subsections a and b of this paragraph. Sums received by any individual for services performed as an elected official who holds an elective office, as defined in G.S. 128-1.1(d), or as a member of the N. C. National Guard, as defined in G.S. 127A-3, or as a member of any reserve component of the United States Armed Forces shall not be considered in determining that individual's employment status under this subsection.

d. An individual's week of unemployment shall be deemed to commence only after his registration at an employment office, except as the Commission may by regulation otherwise prescribe.

(11) "Employment Security Administration Fund" means the Employment Security Administration Fund established by this Chapter, from which administrative expenses under this Chapter shall be paid.

(12) "Wages" means all remuneration for services from whatever source.

(13) a. "Wages" shall include commissions, bonuses, any sums paid to an employee by an employer pursuant to an order of any court, the National Labor Relations Board, or any other lawfully constituted adjudicative agency or by private agreement, consent, or arbitration for loss of pay by reason of discharge, and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the Commission; provided, if the remuneration of an individual is not based upon a fixed period or duration of time or if the individual's wages are paid at irregular intervals or in such manner as not to extend regularly over the period of employment, the wages for any week or for any calendar quarter for the purpose of computing an individual's right to unemployment benefits only shall be determined in such manner as may by

authorized regulations be prescribed. The regulations shall, so far as possible, secure results reasonably similar to those that would prevail if the individual were paid his wages at regular intervals. The term "wages" shall not include the amount of any payment with respect to services to, or on behalf of, an individual in its employ under a plan or system established by an employing unit which makes provision for individuals in its employ generally or for a class or classes of such individuals (including any amount paid by an employing unit for insurance or annuities, or into a fund, to provide for any such payment), on account of (i) retirement, or (ii) sickness or accident disability, or (iii) medical and hospitalization expenses in connection with sickness or accident disability or (iv) death. However, in the case of payments made to an employee or any of his dependents on account of sickness or accident disability, only payments which are received under a worker's compensation law shall be excluded from the term "wages". Furthermore, the term "wages" shall not include payment by an employer without deduction from the remuneration of the employee of the tax imposed upon an employee under the Federal Insurance Contributions Act.

b. "Wages" shall not include:

1. Any payment made to, or on behalf of, an employee or his beneficiary from or to a trust which qualifies under the conditions set forth in Sections 401(a)(1) and (2) of the Internal Revenue Code of 1954;
2. Any payment made to, or under, an annuity plan which at the time of the payment meets the requirements of Sections 401(a)(3), (4), (5) and (6) of the Code and exempt from tax under Section 501(a) of the Code at the time of the payment, unless the payment is made to an employee of the trust as remuneration for services rendered as an employee and not as beneficiary of the trust; or
3. Any payment made to, or on behalf of, an employee or his beneficiary under a Cafeteria Plan within the meaning of Section 125 of the Internal Revenue Code.

c. For the purposes of this Chapter, the term "wages" includes the reasonable amount of gratuities, including tips, that an employee receives directly from a customer and reports to the employer and that the employer considers as salary for the purpose of meeting minimum wage requirements. Effective January 1, 1987, and as long as the Federal Unemployment Tax Act, 26 U.S.C. 3301 et seq., contains materially identical requirements, the term "wages" includes tips which are:

(1) Received while performing services that constitute employment; and

(2) Included in a written statement furnished to the employer pursuant to the requirements of the Internal Revenue Code.

d. Wages shall not include the amount of any payment, including any amount paid into a fund to provide for such payment, made to, or on behalf of, an employee under a plan or system established by an employer or others which makes provision for employees generally, or for a class or group of employees, for the purpose of supplementing unemployment benefits, provided that the plan has been approved by the Commission under such reasonable regulations as it shall promulgate.

(14) "Week" means such period of seven consecutive calendar days as the Commission may by regulations prescribe.

(15) "Calendar quarter" means the period of three consecutive calendar months ending on March 31, June 30, September 30, or December 31.

(16) "Weekly benefit amount." An individual's "weekly benefit amount" means the amount of benefits he would be entitled to receive for one week of total unemployment.

(17) a. Repealed by Session Laws 1977, c. 727, s. 33.

b. Repealed by Session Laws 1977, c. 727, s. 33.

c. As to claims filed on or after October 1, 1974, for claimants who do not have a benefit year in progress, "benefit year" shall mean the one-year period beginning with the first day of a week with respect to which an individual first registers for work and files a valid claim for benefits. A valid claim shall be deemed to have been filed only if such individual, at the time the claim is filed, is unemployed, and has been paid wages in his base period totaling at least five hundred sixty-five dollars and fifty cents ($565.50), and equal to at least one and one-half times his high-quarter wages, which high-quarter wages must equal at least one hundred and fifty dollars ($150.00). As to claims filed on or after August 1, 1981, for claimants who do not have a benefit year in progress, "benefit year" shall mean the 52 week period beginning with the first day of a week with respect to which an individual first registers for work and files a valid claim for benefits. Provided, however, if the first day of a week with respect to which an individual first registers for work and files a valid claim for benefits is either (i) the first day of a calendar quarter, or (ii) the second day of a calendar quarter followed by a February 29 within one year thereof, "benefit year" shall mean the one-year period beginning with that first day of the week with respect to which the individual first registers for work and files a valid claim for benefits. A valid claim shall be deemed to have been filed only if such individual, at the time the claim is filed, is unemployed, and has been paid wages in his base period totaling at least six times the average weekly insured wage, obtained in accordance with G.S. 96-8(22) and equal to at least one and one-half times his high-quarter wages, which high-quarter wages must equal at least one and one-half times the average weekly insured wage, obtained in accordance with G.S. 96-8(22).

d. Repealed by Session Laws, 1981, c. 160, s. 11.

(18) "Base period" means the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year as defined in subdivision (17) of this section.

(19) Repealed by Session Laws 1977, c. 727, s. 35.

(20) The term "American vessel," as used in this Chapter, means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew is performing service solely for one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any state and the term "American aircraft" means an aircraft registered under the laws of the United States.

(21) The words "Employment Security Law" as used in this Chapter mean any law enacted by this State or any other state or territory or by the federal government providing for the payment of unemployment insurance benefits.

(22) Average Weekly Insured Wage. — "Average weekly insured wage" is the quotient obtained by dividing the total of the wages, as defined in G.S. 96-8(12) and (13), reported by all insured employers by the monthly average in insured employment under this Chapter during the immediately preceding calendar year and further dividing the quotient obtained by 52 to obtain a weekly rate. (For this computation the data as released annually in the Employment Security Commission's publication "North Carolina Insured Employment and Wage Payment" shall be used). The quotient thus obtained shall be deemed to be the average weekly wage for such year.

(23) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 680, s. 9, effective July 5, 1994.

(24) Work, for purposes of this Chapter, means any bona fide permanent employment. For purposes of this definition, "bona fide permanent employment" is presumed to include only those employments of greater than 30 consecutive calendar days duration (regardless of whether work is performed on all those days) provided: (a) the presumption that an employment lasting 30 days or less is not bona fide permanent employment may be rebutted by a finding by the Commission, either on its own motion or upon a clear and convincing showing by an interested party that the application of the presumption would work a substantial injustice in view of the intent of this Chapter; (b) Any decision of the Commission on the question of bona fide employment may be disturbed on judicial review only upon a finding of plain error.

(25) Repealed by Session Laws 1981, c. 160, s. 12.

(26) If two or more related corporations concurrently employ the same individual and compensate the individual through a common paymaster that is one of the related corporations, each related corporation shall be considered

to have paid as remuneration to the individual only the amounts actually disbursed by it to the individual and shall not be considered to have paid as remuneration to the individual amounts actually disbursed to the individual by another of the related corporations. (Ex. Sess. 1936, c. 1, s. 19; 1937, c. 448, s. 5; 1939, c. 27, ss. 11-13; c. 52, ss. 6, 7; c. 141; 1941, cc. 108, 198; 1943, c. 377, ss. 31-34; c. 552, ss. 1, 2; 1945, c. 522, ss. 5-10; c. 531, ss. 1, 2; 1947, c. 326, ss. 7-12; c. 598, ss. 1, 5, 8; 1949, c. 424, ss. 3-8½; cc. 523, 863; 1951, c. 322, s. 1; c. 332, ss. 2, 3, 18; 1953, c. 401, ss. 1, 7-11; 1955, c. 385, ss. 3, 4; 1957, c. 1059, ss. 2-4; 1959, c. 362, ss. 2-6; 1961, c. 454, ss. 4-15; 1965, c. 795, ss. 2-5; 1969, c. 575, ss. 4-6, 15; 1971, c. 367; c. 673, ss. 5-13; c. 863; c. 1231, s. 1; 1973, c. 172, s. 1; c. 476, ss. 133, 152; c. 740, s. 2; c. 1138, ss. 1, 2; 1975, c. 226, s. 3; 1977, c. 727, ss. 14-36; 1979, c. 660, ss. 3-12; 1981, c. 160, ss. 3-12; c. 774, s. 1; 1983, c. 585, s. 20; c. 625, s. 9; c. 675; 1985, c. 57; c. 197, s. 3; c. 322, s. 1; c. 552, ss. 1-4; 1987, c. 103, ss. 2, 3; c. 212; c. 564, s. 21; 1987 (Reg. Sess., 1988), c. 999, s. 1; 1989, c. 410; c. 583, ss. 3, 5; c. 770, ss. 18, 19; 1991, c. 458, s. 1; 1993, c. 122, s. 1; c. 553, s. 30; 1993 (Reg. Sess., 1994), c. 680, ss. 4, 7-9.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective July 5, 1994, added subdivision (8a), repealed subdivisions (6)k.1., (6)k.2., (6)k.4., (6)k.5., and (23), and rewrote subdivision (18).

CASE NOTES

II. "Employer".

II. "EMPLOYER".

Unemployment Taxes. — An employer must pay state unemployment taxes on his alien farm workers with seasonal agricultural worker, "SAW" status. State ex rel. Emp. Sec. Comm'n v. Hopkins, 111 N.C. App. 437, 432 S.E.2d 703 (1993).

§ 96-9. Contributions.

(a) Payment. —

(1) Except as provided in subsection (d) hereof, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Chapter, with respect to wages for employment (as defined in G.S. 96-8(6)). Such contributions shall become due and be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ. Contributions shall become due on and shall be paid on or before the last day of the month following the close of the calendar quarter in which such wages are paid and such contributions shall be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided, further, that if the Commission shall be

advised by its duly authorized officers or agents that the collection of any contribution under any provision of this Chapter will be jeopardized by delay, the Commission may, whether or not the time otherwise prescribed by law for making returns and paying such tax has expired, immediately assess such contributions (together with all interest and penalties, the assessment of which is provided for by law). Such contributions, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the Commission for the payment thereof. Upon failure or refusal to pay such contributions, penalties, and interest, it shall be lawful to make collection thereof as provided by G.S. 96-10 and subsections thereunder and such collection shall be lawful without regard to the due date of contributions herein prescribed, provided, further, that nothing in this paragraph shall be construed as permitting any refund of contributions heretofore paid under the law and regulations in effect at the time such contributions were paid.

(2) In the payment of any contributions a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent.

(3) Benefits paid employees of this State shall be financed and administered in accordance with the provisions and conditions of G.S. 96-9(d) required for nonprofit organizations; except as provided by suitable regulations which may be adopted by the Commission. The Department of Administration shall make an election with respect to financing all such benefits.

(4) Political subdivisions of this State may finance benefits paid to employees either by coming under the experience rating program provided in G.S. 96-9(b) or by coming into the program on a reimbursement basis in accordance with the provisions and conditions of G.S. 96-9(f). Any election made shall be binding upon the political subdivision so electing for a period of four years.

(5) Prior to January 1, 1978, the term "wages" shall not include for the purposes of this section any remuneration in excess of four thousand two hundred dollars ($4,200) paid to any individual in a single calendar year by an employer with respect to employment.

For purposes of this section, the term "wages" shall not include any remuneration paid to any employee in this State in excess of this State's tax base paid to an individual by a single employer if the employer of that individual made contributions in another state or states upon the wages paid to such individual during the applicable calendar year, because of work performed in another state or states.

Any successor employer as defined in G.S. 96-8(5)b for the purposes of this section shall pay no contributions on that part of remuneration earned by any individual in the employ of the successor employer which, when added to the remuneration previously paid by the predecessor employer exceeded this State's tax base in a single calendar year, provided the individual was an employee of the predecessor and was taken over as an employee by the successor as a part of the organization acquired and, provided further, that the predecessor employer has paid contributions on the wages paid to such individual while in his employ during the year of acquisition and the account of the predecessor is transferred to the successor in accordance with G.S. 96-9(c)(4)a.

Beginning January 1, 1978, and thereafter, the taxable wage base of any employee whose wages are subject to taxation, whether totally or partially, by the State of North Carolina under any provision of this Chapter shall be the federally required tax base.

On the computation date (August 1) in 1983 and each computation date thereafter, the Commission shall compute the average yearly insured wage by multiplying the average weekly insured wage (obtained in accordance with G.S. 96-8(22)) by 52. During the calendar year following the computation date, the taxable wage base shall be the greater of the federally required tax base or the product resulting from multiplying the average yearly insured wage by sixty percent (60%), rounded to the nearest multiple of one hundred dollars ($100.00).

(6) If the amount of the contributions shown to be due after all credits is less than one dollar ($1.00), no payment need be made. If an employer has paid contributions, penalties, and/or interest in excess of the amount due, this shall be considered an overpayment and refunded provided no other debts are owed to the Commission by the employer. Overpayments of less than one dollar ($1.00) shall be refunded only upon receipt by the Chairman of a written demand for such refund from the employer. Nothing herein shall be construed to change or extend the limitation set forth in G.S. 96-10(e), (f), and (i).

(7) **(Effective until September 30, 1995)** Effective with the quarter ending September 30, 1992, every employer with 250 or more employees, and every person or organization that, as agent, reports wages on a total of 250 or more employees on behalf of one or more subject employers, shall file that portion of the "Employer's Quarterly Tax and Wage Report" that contains the name, social security number, and gross wages of each individual in employment on magnetic tapes or diskettes in a format prescribed by the Commission.

(7) **(Effective September 30, 1995)** Effective with the quarter ending September 30, 1992, every employer with 250 or more employees, and every person or organization that, as agent, reports wages on a total of 250 or more employees on behalf of one or more subject employers, shall file that portion of the "Employer's Quarterly Tax and Wage Report" that contains the name, social security number, and gross wages of each individual in employment on magnetic tapes or diskettes in a format prescribed by the Commission.

For failure of an employer to comply with this subdivision, there shall be added to the amount required to be

§ 96-9(a)(7) is set out twice. See notes.

shown as tax in the reports a penalty of twenty-five dollars ($25.00). For failure of an agent to comply with this subdivision, the Commission may deny the agent the right to report wages and file reports for the employer for whom the agent filed an improper report for a period of one year following the calendar quarter in which that agent filed the improper report. The Commission may reduce or waive a penalty for good cause shown.

(b) Rate of Contributions. —

(1) The standard beginning rate of contributions for an employer is a percentage of wages paid by the employer during a calendar year for employment occurring during that year. The rate is determined in accordance with the following table:

Percentage	Date After Which Employment Occurs
2.25%	December 31, 1986
1.8	December 31, 1993.

(2) a. No employer's contribution rate shall be reduced below the standard rate for any calendar year unless and until his account has been chargeable with benefits throughout more than 13 consecutive calendar months ending July 31 immediately preceding the computation date and his credit reserve ratio meets the requirements of that schedule used in the computation.

b. The Commission shall, for each year, compute a credit reserve ratio for each employer whose account has a credit balance and has been chargeable with benefits as set forth in G.S. 96-9(b)(2)a of this Chapter. An employer's credit reserve ratio shall be the quotient obtained by dividing the credit balance of such employer's account as of July 31 of each year by the total taxable payroll of such employer for the 36 calendar-month period ending June 30 preceding the computation date. Credit balance as used in this section means the total of all contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits to the account of the employer less the total benefits charged to the account of the employer for all past periods.

c. The Commission shall for each year compute a debit ratio for each employer whose account shows that the total of all his contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits is less than the total benefits charged to his account for all past periods. An employer's debit ratio shall be the quotient obtained by dividing the debit balance of such employer's account as of July 31 of each year by the total taxable payroll of such employer for the 36 calendar-month period ending June 30 preceding the computation date. The amount arrived at by subtracting the total amount of all contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits of the employer from the total amount of all benefits charged to the account of the employer for such periods is the employer's debit balance.

For purposes of this subsection, the first date on which an account shall be chargeable with benefits shall be the first date with respect to which a benefit year (as defined in G.S. 96-8(17)[)] can be established, based in whole or in part on wages paid by that employer.

No employer's contribution rate shall be reduced below the standard rate for any calendar year unless his liability extends over a period of all or part of three consecutive calendar years and, as of August 1 of the third year, his credit reserve ratio meets the requirements of that schedule used in computing rates for the following calendar year, unless the employer's liability was established under G.S. 96-8(5)b and his predecessor's account was transferred as provided by G.S. 96-9(c)(4)a.

Whenever contributions are erroneously paid into one account which should have been paid into another account or which should have been paid into a new account, that erroneous payment can be adjusted only by refunding the erroneously paid amounts to the paying entity. No pro rata adjustment to an existing account may be made, nor can a new account be created by transferring any portion of the erroneously paid amount, notwithstanding that the entities involved may be owned, operated, or controlled by the same person or organization. No adjustment of a contribution rate can be made reducing said rate below the standard rate for any period in which the account was not in actual existence and in which it was not actually chargeable for benefits. Whenever payments are found to have been made to the wrong account, refunds can be made to the entity making the wrongful payment for a period not exceeding five years from the last day of the calendar year in which it is determined that wrongful payments were made. Notwithstanding payment into the wrong account, any entity which is determined to have met the requirements to be a covered employer, whether or not the entity has had paid on the account of its employees any sum into another account, the Commission shall collect contributions at the standard rate or the assigned rate, whichever is higher, for the five years preceding the determination of erroneous payments, said five years to run from the last day of the calendar year in which the determination of liability for contributions or additional contributions is made. This paragraph shall apply to all cases arising hereunder, the question of good faith notwithstanding.

(3)a. through c. Repealed by Session Laws 1977, c. 727, s. 39.

d. Rate schedule A,B,C,D,E,F,G,H, or I appearing on the line opposite the fund ratio in the following Fund Ratio Schedules table shall be applicable in determining and assigning each eligible employer's contribution rate for the calendar year immediately following the computation date. The fund ratio is the total amount available for benefits in the Unemployment Insurance Fund on the computation date divided by the total amount of the taxable payroll of all subject employers for the 12-month period ending June 30 preceding the computation date.

FUND RATIO SCHEDULES

When the Fund Ratio Is: As Much As	But Less Than	Applicable Schedule
——	2.0%	A
2.0%	3.0%	B
3.0%	4.0%	C
4.0%	5.0%	D
5.0%	6.0%	E
6.0%	7.0%	F
7.0%	8.0%	G
8.0%	9.0%	H
9.0% and in excess thereof		I

d1. **(Repealed effective January 1, 1997)** The standard contribution rate set by subdivision (b)(1) of this section applies to an employer unless the employer's account has a credit balance. Until January 1, 1994, the contribution rate of an employer whose account has a credit balance is determined in accordance with the rate set in the following Experience Rating Formula table for the applicable rate schedule. The contribution rate of an employer whose contribution rate is determined by this Experience Rating Formula table shall be reduced by thirty percent (30%) for any year in which the balance in the Unemployment Insurance Fund equals or exceeds eight hundred million dollars ($800,000,000) on the computation date.

EXPERIENCE RATING FORMULA

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
——	0.2%	2.70	2.70	2.70	2.70	2.70	2.70	2.50	2.30	2.10
0.2%	0.4%	2.70	2.70	2.70	2.70	2.70	2.50	2.30	2.10	1.90
0.4%	0.6%	2.70	2.70	2.70	2.70	2.50	2.30	2.10	1.90	1.70
0.6%	0.8%	2.70	2.70	2.70	2.50	2.30	2.10	1.90	1.70	1.50
0.8%	1.0%	2.70	2.70	2.50	2.30	2.10	1.90	1.70	1.50	1.30
1.0%	1.2%	2.70	2.50	2.30	2.10	1.90	1.70	1.50	1.30	1.10
1.2%	1.4%	2.50	2.30	2.10	1.90	1.70	1.50	1.30	1.10	0.90
1.4%	1.6%	2.30	2.10	1.90	1.70	1.50	1.30	1.10	0.90	0.80
1.6%	1.8%	2.10	1.90	1.70	1.50	1.30	1.10	0.90	0.80	0.70
1.8%	2.0%	1.90	1.70	1.50	1.30	1.10	0.90	0.80	0.70	0.60
2.0%	2.2%	1.70	1.50	1.30	1.10	0.90	0.80	0.70	0.60	0.50
2.2%	2.4%	1.50	1.30	1.10	0.90	0.80	0.70	0.60	0.50	0.40
2.4%	2.6%	1.30	1.10	0.90	0.80	0.70	0.60	0.50	0.40	0.30

§ 96-9(b)(3)(d1) has a delayed repeal date. See notes.

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
2.6%	2.8%	1.10	0.90	0.80	0.70	0.60	0.50	0.40	0.30	0.20
2.8%	3.0%	0.90	0.80	0.70	0.60	0.50	0.40	0.30	0.20	0.15
3.0%	3.2%	0.80	0.70	0.60	0.50	0.40	0.30	0.20	0.15	0.10
3.2%	3.4%	0.70	0.60	0.50	0.40	0.30	0.20	0.15	0.10	0.09
3.4%	3.6%	0.60	0.50	0.40	0.30	0.20	0.15	0.10	0.09	0.08
3.6%	3.8%	0.50	0.40	0.30	0.20	0.15	0.10	0.09	0.08	0.07
3.8%	4.0%	0.40	0.30	0.20	0.15	0.10	0.09	0.08	0.07	0.06
4.0%	4.2%	0.30	0.20	0.15	0.10	0.09	0.08	0.07	0.06	0.05
4.2%	4.4%	0.20	0.15	0.10	0.09	0.08	0.07	0.06	0.05	0.04
4.4%	4.6%	0.15	0.10	0.09	0.08	0.07	0.06	0.05	0.04	0.03
4.6%	4.8%	0.10	0.09	0.08	0.07	0.06	0.05	0.04	0.03	0.02
4.8%	5.0%	0.09	0.08	0.07	0.06	0.05	0.04	0.03	0.02	0.01
5.0%	5.2%	0.08	0.07	0.06	0.05	0.04	0.03	0.02	0.01	0.01
5.2%	5.4%	0.07	0.06	0.05	0.04	0.03	0.02	0.01	0.01	0.01
5.4%	5.6%	0.06	0.05	0.04	0.03	0.02	0.01	0.01	0.01	0.01
5.6%	5.8%	0.05	0.04	0.03	0.02	0.01	0.01	0.01	0.01	0.01
5.8%	6.0%	0.04	0.03	0.02	0.01	0.01	0.01	0.01	0.01	0.01
6.0%	6.2%	0.03	0.02	0.01	0.01	0.01	0.01	0.01	0.01	0.01
6.2%	6.4%	0.02	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01
6.4% & Over		0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01

d2. The standard contribution rate set by subdivision (b)(1) of this section applies to an employer unless the employer's account has a credit balance. Beginning January 1, 1994, the contribution rate of an employer whose account has a credit balance is determined in accordance with the rate set in the following Experience Rating Formula table for the applicable rate schedule. The contribution rate of an employer whose contribution rate is determined by this Experience Rating Formula table shall be reduced by fifty percent (50%) for any year in which the balance in the Unemployment Insurance Fund equals or exceeds eight hundred million dollars ($800,000,000) on the computation date.

EXPERIENCE RATING FORMULA

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
0.0%	0.2%	2.70	2.70	2.70	2.70	2.70	2.50	2.30	2.10	1.90
0.2%	0.4%	2.70	2.70	2.70	2.70	2.50	2.30	2.10	1.90	1.70
0.4%	0.6%	2.70	2.70	2.70	2.50	2.30	2.10	1.90	1.70	1.50
0.6%	0.8%	2.70	2.70	2.50	2.30	2.10	1.90	1.70	1.50	1.30

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
0.8%	1.0%	2.70	2.50	2.30	2.10	1.90	1.70	1.50	1.30	1.10
1.0%	1.2%	2.50	2.30	2.10	1.90	1.70	1.50	1.30	1.10	0.90
1.2%	1.4%	2.30	2.10	1.90	1.70	1.50	1.30	1.10	0.90	0.80
1.4%	1.6%	2.10	1.90	1.70	1.50	1.30	1.10	0.90	0.80	0.70
1.6%	1.8%	1.90	1.70	1.50	1.30	1.10	0.90	0.80	0.70	0.60
1.8%	2.0%	1.70	1.50	1.30	1.10	0.90	0.80	0.70	0.60	0.50
2.0%	2.2%	1.50	1.30	1.10	0.90	0.80	0.70	0.60	0.50	0.40
2.2%	2.4%	1.30	1.10	0.90	0.80	0.70	0.60	0.50	0.40	0.30
2.4%	2.6%	1.10	0.90	0.80	0.70	0.60	0.50	0.40	0.30	0.20
2.6%	2.8%	0.90	0.80	0.70	0.60	0.50	0.40	0.30	0.20	0.15
2.8%	3.0%	0.80	0.70	0.60	0.50	0.40	0.30	0.20	0.15	0.10
3.0%	3.2%	0.70	0.60	0.50	0.40	0.30	0.20	0.15	0.10	0.09
3.2%	3.4%	0.60	0.50	0.40	0.30	0.20	0.15	0.10	0.09	0.08
3.4%	3.6%	0.50	0.40	0.30	0.20	0.15	0.10	0.09	0.08	0.07
3.6%	3.8%	0.40	0.30	0.20	0.15	0.10	0.09	0.08	0.07	0.06
3.8%	4.0%	0.30	0.20	0.15	0.10	0.09	0.08	0.07	0.06	0.05
4.0%	4.2%	0.20	0.15	0.10	0.09	0.08	0.07	0.06	0.05	0.04
4.2%	4.4%	0.15	0.10	0.09	0.08	0.07	0.06	0.05	0.04	0.03
4.4%	4.6%	0.10	0.09	0.08	0.07	0.06	0.05	0.04	0.03	0.02
4.6%	4.8%	0.09	0.08	0.07	0.06	0.05	0.04	0.03	0.02	0.01
4.8%	5.0%	0.08	0.07	0.06	0.05	0.04	0.03	0.02	0.01	0.01
5.0%	5.2%	0.07	0.06	0.05	0.04	0.03	0.02	0.01	0.01	0.01
5.2%	5.4%	0.06	0.05	0.04	0.03	0.02	0.01	0.01	0.01	0.01
5.4%	5.6%	0.05	0.04	0.03	0.02	0.01	0.01	0.01	0.01	0.01
5.6%	5.8%	0.04	0.03	0.02	0.01	0.01	0.01	0.01	0.01	0.01
5.8%	6.0%	0.03	0.02	0.01	0.01	0.01	0.01	0.01	0.01	0.01
6.0%	6.2%	0.02	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01
6.2% & Over		0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01

e. Each employer whose account as of any computation date occurring after August 1, 1964, shows a debit balance shall be assigned the rate of contributions appearing on the line opposite his debit ratio as set forth in the following Rate Schedule for Overdrawn Accounts:

RATE SCHEDULE FOR OVERDRAWN ACCOUNTS BEGINNING WITH THE CALENDAR YEAR 1978

When The Debit Ratio Is:		
As Much As	But Less Than	Assigned Rate
0.0%	0.3%	2.9%
0.3	0.6	3.1
0.6	0.9	3.3
0.9	1.2	3.5
1.2	1.5	3.7

When The Debit Ratio Is: As Much As	But Less Than	Assigned Rate
1.5	1.8	3.9
1.8	2.1	4.1
2.1	2.4	4.3
2.4	2.7	4.5
2.7	3.0	4.7
3.0	3.3	4.9
3.3	3.6	5.1
3.6	3.9	5.3
3.9	4.2	5.5
4.2 and over		5.7

The Rate Schedule for Overdrawn Accounts Beginning with the Calendar Year 1966 in force in any particular calendar year shall apply to all accounts for that calendar year subsequent replacement enactments notwithstanding.

f. The computation date for all contribution rates shall be August 1 of the calendar year preceding the calendar year with respect to which such rates are effective.

g. Any employer may at any time make a voluntary contribution, additional to the contributions required under this Chapter, to the fund to be credited to his account, and such voluntary contributions when made shall for all intents and purposes be deemed "contributions required" as said term is used in G.S. 96-8(8). Any voluntary contributions so made by an employer within 30 days after the date of mailing by the Commission pursuant to G.S. 96-9(c)(3) herein, of notification of contribution rate contained in cumulative account statement and computation of rate, shall be credited to his account as of the previous July 31. Provided, however, any voluntary contribution made as provided herein after July 31 of any year shall not be considered a part of the balance of the unemployment insurance fund for the purposes of G.S. 96-9(b)(3) until the following July 31. The Commission in accepting a voluntary contribution shall not be bound by any condition stipulated in or made a part of such voluntary contribution by any employer.

h. If, within the calendar month in which the computation date occurs, the Commission finds that any employing unit has failed to file any report required in connection therewith or has filed a report which the Commission finds incorrect or insufficient, the Commission shall make an estimate of the information required from such employing unit on the basis of the best evidence reasonably available to it at the time and shall notify the employing unit thereof by registered mail addressed to its last known address. Unless such employing unit shall file the report or a corrected or sufficient report, as the case may be, within 15 days after the mailing of such notice, the Commission shall compute such employing unit's rate of contributions on the basis of such estimates, and the rate as so determined shall be subject to increases but not to reduction, on the basis of subsequently ascertained information.

i. Repealed by Session Laws 1987, c. 17, s. 5.

j. A tax is imposed upon contributions at the rate of twenty percent (20%) of the amount of contributions due. The tax is due and payable at the time and in the same manner as the contributions. The tax does not apply in a calendar year if, as of August 1 of the preceding year, the amount in the Reserve Fund equals or exceeds one hundred sixty-three million three hundred forty-nine thousand dollars ($163,349,000), which is one percent (1%) of taxable wages for calendar year 1984. The collection of this tax, the assessment of interest and penalties on unpaid taxes, the filing of judgment liens, and the enforcement of the liens for unpaid taxes is governed by the provisions of G.S. 96-10 where applicable. Taxes collected under this subpart shall be credited to the Employment Security Commission Reserve Fund, and refunds of the taxes shall be paid from the same Fund. Any interest or penalties collected on unpaid taxes shall be credited to the Special Employment Security Administration Fund, and any interest or penalties refunded on taxes imposed by this subpart shall be paid from the same Fund.

(c)(1) Except as provided in subsection (d) of this section, the Commission shall maintain a separate account for each employer and shall credit his account with all voluntary contributions made by him and all other contributions which he has paid or is paid on his behalf, provided the Commission shall credit the account of each employer in an amount equal to eighty percent (80%) of all voluntary contributions paid with respect to periods prior to January 1, 1984, and of all other contributions paid with respect to periods between July 1, 1965, and December 31, 1983. On the computation date, beginning first with August 1, 1948, the ratio of the credit balance in each individual account to the total of all the credit balances in all employer accounts shall be computed as of such computation date, and an amount equal to the interest credited to this State's account in the unemployment trust fund in the treasury of the United States for the four most recently completed calendar quarters shall be credited prior to the next computation date on a pro rata basis to all employers' accounts having a credit balance on the computation date. Such amount shall be prorated to the individual accounts in the same ratio that the credit balance in each individual account bears to the total of the credit balances in all such accounts. In computing the amount to be credited to the account of an employer as a result of interest earned by funds on deposit in the unemployment trust fund in the treasury of the United States to the account of this State, any voluntary contributions made by an employer after July 31 of any year shall not be considered a part of the account balance of the employer until the next computation date occurring after such voluntary contribution was made. No provision in this section shall in any way be subject to or affected by any provisions of the Executive Budget Act, as amended. Nothing in this Act shall be construed to grant any employer or individual in his service prior claims or rights to the amount paid by him into the fund either on his own behalf or on behalf of such individuals.

(2) Charging of benefit payments. —

a. Benefits paid shall be allocated to the account of each base period employer in the proportion that the base period wages paid to an eligible individual in any calendar quarter by each such employer bears to the total wages paid by all base period employers during the base period, except as hereinafter provided in paragraphs b, c, and d of this subdivision, G.S. 96-9(d)(2)c, and 96-12(e)G. The amount so allocated shall be multiplied by one hundred twenty percent (120%) and charged to that employer's account. Benefits paid shall be charged to employers' accounts upon the basis of benefits paid to claimants whose benefit years have expired.

b. Any benefits paid to any claimant under a claim filed for a period occurring after the date of such separations as are set forth in this paragraph and based on wages paid prior to the date of (i) the leaving of work by the claimant without good cause attributable to the employer; (ii) the discharge of claimant for misconduct in connection with his work; (iii) the discharge of the claimant for substantial fault as that term may be defined in G.S. 96-14; (iv) the discharge of the claimant solely for a bona fide inability to do the work for which he was hired but only where the claimant was hired pursuant to a job order placed with a local office of the Commission for referrals to probationary employment (with a probationary period no longer than 100 days), which job order was placed in such circumstances and which satisfies such conditions as the Commission may by regulation prescribe and only to the extent of the wages paid during such probationary employment; (v) separations made disqualifying under G.S. 96-14(2B) and (6A); or (vi) separation due to leaving for disability or health condition shall not be charged to the account of the employer by whom the claimant was employed at the time of such separation; provided, however, said employer promptly furnishes the Commission with such notices regarding any separation of the individual from work as are or may be required by the regulations of the Commission.

No benefit charges shall be made to the account of any employer who has furnished work to an individual who, because of the loss of employment with one or more other employers, becomes eligible for partial benefits while still being furnished work by such employer on substantially the same basis and substantially the same amount as had been made available to such individual during his base period whether the employments were simultaneous or successive; provided, that such employer makes a written request for noncharging of benefits in accordance with Commission regulations and procedures.

No benefit charges shall be made to the account of any employer for benefit years ending on or before June 30, 1992, where benefits were paid as a result of a discharge due directly to the reemployment of a veteran mandated by the Veteran's Reemployment Rights Law, 38 USCA § 2021, et seq.

No benefit charges shall be made to the account of any employer where benefits are paid as a result of a decision by an Adjudicator, Appeals Referee or the Commission if such decision to pay benefits is ultimately reversed; nor shall any such benefits paid be deemed to constitute an overpayment under G.S. 96-18(g)(2), the provisions thereof notwithstanding. Provided, an overpayment of benefits paid shall be established in order to provide for the waiting period required by G.S. 96-13(c).

c. Any benefits paid to any claimant who is attending a vocational school or training program as provided in G.S. 96-13(a)(3) shall not be charged to the account of the base period employer(s).

d. Any benefits paid to any claimant under the following conditions shall not be charged to the account of the base period employer(s):

1. The benefits are paid for unemployment due directly to a major natural disaster, and
2. The President has declared the disaster pursuant to the Disaster Relief Act of 1970, 42 USCA 4401, et seq., and
3. The benefits are paid to claimants who would have been eligible for disaster unemployment assistance under this Act, if they had not received unemployment insurance benefits with respect to that unemployment.

e.1. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to the experience rating account of any employer.

2. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service.

(3) As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each employer's account and shall furnish him with a statement of all charges and credits thereto. At the same

time the Commission shall notify each employer of his rate of contributions as determined for the succeeding calendar year pursuant to this section. Such determination shall become final unless the employer files an application for review or redetermination prior to May 1 following the effective date of such rates. The Commission may redetermine on its own motion within the same period of time.

(4) Transfer of account. —

a. Whenever any individual, group of individuals, or employing unit, who or which, in any manner succeeds to or acquires substantially all or a distinct and severable portion of the organization, trade, or business of another employing unit as provided in G.S. 96-8, subdivision (5), paragraph b, the account or that part of the account of the predecessor which relates to the acquired portion of the business shall, upon the mutual consent of the parties concerned and approval of the Commission in conformity with the regulations as prescribed therefor, be transferred as of the date of acquisition of the business to the successor employer for use in the determination of his rate of contributions, provided application for transfer is made within 60 days after the Commission notifies the successor of his right to request such transfer, otherwise the effective date of the transfer shall be the first day of the calendar quarter in which such application is filed, and that after the transfer the successor employing unit continues to operate the transferred portion of such organization, trade or business. Provided, however, that the transfer of an account for the purpose of computation of rates shall be deemed to have been made prior to the computation date falling within the calendar year within which the effective date of such transfer occurs and the account shall thereafter be used in the computation of the rate of the successor employer for succeeding years, subject, however, to the provisions of paragraph b of this subdivision.

On or after August 1, 1988, whenever any individual, group of individuals, or employing unit, who or which, in any manner succeeds to or acquires all of the organization, trade, or business of another employing unit as provided in G.S. 96-8, subdivision (5), paragraph b, the account of the predecessor shall be transferred as of the date of the acquisition of the business to the successor employer for use in the determination of his rate of contributions. Whenever any individual, group of individuals, or employing unit, who or which, in any manner succeeds to or acquires a distinct and severable portion of the organization, trade, or business of another employing unit as provided in G.S. 96-8, subdivision (5), paragraph b, that part of the account of the predecessor which relates to the acquired portion of the business shall, upon the mutual consent of the parties concerned and approval of the Commission in conformity with the regulations as prescribed therefor, be transferred as of the date of acquisition of the business to the successor employer for use in the determination of his rate of contributions, provided application for transfer is made within 60 days after the Commission notifies the successor of his right to request such transfer, otherwise the effective date of the transfer shall be the first day of the calendar quarter in which such application is filed, and that after the transfer the successor employing unit continues to operate the transferred portion of such organization, trade or business. Provided, however, that the transfer of an account for the purpose of computation of rates shall be deemed to have been made prior to the computation date falling within the calendar year within which the effective date of such transfer occurs and the account shall thereafter be used in the computation of the rate of the successor employer for succeeding years, subject, however, to the provisions of paragraph b of this subdivision. No request for a transfer of the account will be accepted and no transfer of the account will be made if the request for the transfer of the account is not received within two years of the date of acquisition or notification by the Commission of the right to request such transfer, whichever occurs later. However, in no event will a request for a transfer be allowed if an account has been terminated because an employer ceases to be an employer pursuant to G.S. 96-9(c)(5) and G.S. 96-11(d) regardless of the date of notification.

b. Notwithstanding any other provisions of this section, if the successor employer was an employer subject to this Chapter prior to the date of acquisition of the business, his rate of contribution for the period from such date to the end of the then current contribution year shall be the same as his rate in effect on the date of such acquisition. If the successor was not an employer prior to the date of the acquisition of the business he shall be assigned a standard rate of contribution set forth in G.S. 96-9(b)(1) for the remainder of the year in which he acquired the business of the predecessor; however, if such successor makes application for the transfer of the account within 60 days after notification by the Commission of his right to do so and the account is transferred, or meets the requirements for mandatory transfer, he shall be assigned for the remainder of such year the rate applicable to the predecessor employer or employers on the date of acquisition of the business, provided there was only one predecessor or if more than one and the predecessors had identical rates. In the event the rates of the predecessor were not identical, the rate of the successor shall be the highest rate applicable to any of the predecessor employers on the date of acquisition of the business.

Irrespective of any other provisions of this Chapter, when an account is transferred in its entirety by an employer to a successor, the transferring employer shall thereafter pay the standard rate of contributions of two and seven-tenths percent (2.7%) and shall continue to pay at such rate until he qualifies for a reduction, reacquires the account he transferred or acquires the experience rating account of another employer, or is subject to an increase in rate under the conditions prescribed in G.S. 96-9(b)(2) and (3). However, when an account is transferred in its entirety by an employer to a successor on or after January 1, 1987, the transferring employer shall thereafter pay the standard beginning rate of contributions of two and twenty-five hundredths percent (2.25%) and shall continue to pay at such rate until he qualifies for a reduction, reacquires the account he transferred or acquires the experience rating account of another employer, or is subject to an increase in rate under the conditions prescribed in G.S. 96-9(b)(2) and (3).

c. In those cases where the organization, trade, or business of a deceased person, or insolvent debtor is taken over and operated by an administrator, administratrix, executor, executrix, receiver, or trustee in bankruptcy, such employing units shall automatically succeed to the account and rate of contribution of such deceased person, or insolvent debtor without the necessity of the filing of a formal application for the transfer of such account.

(5) In the event any employer subject to this Chapter ceases to be such an employer, his account shall be closed and the same shall not be used in any future computation of such employer's rate nor shall any period prior to the effective date of the termination of such employer during which benefits were chargeable be considered in the application of G.S. 96-9(b)(2) of this Chapter.

(6) If the Commission finds that an employer's business is closed solely because of the entrance of one or more of the owners, officers, partners, or the majority stockholder into the Armed Forces of the United States, or of any of its allies, or of the United Nations, such employer's experience rating account shall not be terminated; and, if the business is resumed within two years after the discharge or release from active duty in the Armed Forces of such person or persons, the employer's account shall be deemed to have been chargeable with benefits throughout more than 13 consecutive calendar months ending July 31 immediately preceding the computation date. This subdivision shall apply only to employers who are liable for contributions under the experience rating system of financing unemployment benefits. This subdivision shall not be construed to apply to employers who are liable for payments in lieu of contributions or to employers using the reimbursable method of financing benefit payments.

(d) Benefits paid to employees of nonprofit organizations shall be financed in accordance with the provisions of this paragraph. For the purposes of this paragraph, a nonprofit organization is an organization (or group of organizations) described in section 501(c)(3) of the United States Internal Revenue Code of 1954 which is exempt from income tax under section 501(a) of said Code.

(1) a. Any nonprofit organization which becomes subject to this Chapter on or after January 1, 1972, shall pay contributions under the provisions of this Chapter, unless it elects in accordance with this paragraph to pay the Commission for the Unemployment Insurance Fund an amount equal to the amount of regular benefits and of one half of the extended benefits paid, that is attributable to service in the employ of such nonprofit organization, to individuals for weeks of unemployment which begin within a benefit year established during the effective period of such election.

b. Any nonprofit organization which is or becomes subject to this Chapter on or after January 1, 1972, may elect to become liable for payments in lieu of contributions for a period of not less than four calendar years beginning with the date on which subjectivity begins by filing a written notice of its election with the Commission not later than 30 days immediately following the date of written notification of the determination of such subjectivity. Provided if notification is not by registered mail, the election may be made on or after January 1, 1972, within six months following the date of the written notification of the determination of such subjectivity. If such election is not made as set forth herein, no election can be made until after four calendar years have elapsed under the contributions method of payment.

c. Any nonprofit organization which makes an election in accordance with subparagraph b of this paragraph will continue after such four calendar years to be liable for payments in lieu of contributions until it files with the Commission a written notice terminating its election not later than 30 days prior to the next January 1, effective on such January 1.

d. Any nonprofit organization which has been paying contributions under this Chapter for a period of at least four consecutive calendar years subsequent to January 1, 1972, may elect to change to a reimbursement basis by filing with the Commission not later than 30 days prior to the next January 1 a written notice of election to become liable for payments in lieu of contributions, effective on such January 1. Such election shall not be terminable for a period of four calendar years. In the event of such an election, the account of such employer shall be closed and shall not be used in any future computation of such employer's contribution rate in any manner whatsoever. Provided, however, any nonprofit employer formerly paying contributions who elects and qualifies to change to a reimbursement basis may be relieved of the requirement to pay one percent (1%) of taxable wages as required by G.S. 96-9(d)(2)a to the following extent and upon the following conditions:

1. Any nonprofit employer which has, for the year the election will be effective, an experience rating of 1.7 or less, will have transferred from its experi-

ence rating account an amount equal to one percent (1%) of its payroll as reported for each of the four calendar quarters which constitute the election year;

2. Any nonprofit employer which has, for the year the election will be effective, an experience rating of less than 2.7 but more than 1.7, will have transferred from its experience rating account an amount equal to one-half of one percent (.5%) of its payroll as reported for each of the four calendar quarters which constitute the election year. Such employers shall make advance payments to the Commission quarterly, computed at one-half of one percent (.5%) of the taxable wages reported as provided in G.S. 96-9(d)(2)a;

3. Any nonprofit employer which has, for the year the election will become effective, an experience rating of 2.7 or more, upon electing to change to a reimbursement basis, will meet all the requirements of G.S. 96-9(d)(2)a, including making advance payments computed at one percent (1%) of taxable wages.

e. The Commission, in accordance with such regulations as it may adopt, shall notify each nonprofit organization of any determination which it may make of its status as an employer and of the effective date of any election which it makes and of any termination of such election. Such determinations shall be subject to reconsideration, appeal and review.

(2) Payments in lieu of contributions shall be made in accordance with the provisions of this subparagraph and shall be processed as provided herein.

a. Quarterly contributions and wage reports and advance payments shall be submitted to the Commission quarterly under the same conditions and requirements of G.S. 96-9 and 96-10, except that the amount of advance payments shall be computed as one percent (1%) of taxable wages and entered on such reports; provided that such advance payments shall become effective only with respect to the first four thousand two hundred dollars ($4,200) in wages paid in a calendar year until January 1, 1978. On and after that date advance payments shall be effective with respect to the federally required wage base provided that after December 31, 1983, the wage base shall be the same as that provided for in G.S. 96-9(a)(5). Collection of such advance payments shall be made as provided for the collection of contributions in G.S. 96-10.

Beginning January 1, 1978, any employer making quarterly reports of employment to the Commission and if such employer is a newly electing reimbursement employer he shall pay contributions of one percent (1%) of taxable wages entered on such reports.

Any employer paying by reimbursement having been, prior to July 1, under the reimbursement method of payment for the preceding calendar year, shall continue to file quarterly reports but shall make no payments with those reports.

b. The Commission shall establish a separate account for each such employer and such account shall be credited, and maintained as provided in G.S. 96-9(c)(1), except that advance payments shall be credited in full and voluntary contributions are not applicable.

c. Benefits paid shall be allocated to the employer's account in accordance with G.S. 96-9(c)(2)a but charged to such account without the application of any multiplier, and no benefits shall be noncharged except amounts equal to fifty percent (50%) of extended benefits paid and amounts equal to one hundred percent (100%) of benefits paid through error.

d. As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each such employer's account and shall furnish him with a statement of all charges and credits thereto.

As of the second computation date (August 1) following the effective date of liability and as of each computation date thereafter, any credit balance remaining in the employer's account (after all applicable postings) in excess of whichever is the greater (a) benefits charged to such account during the 12 months ending on such computation date, or (b) one percent (1%) of taxable wages for the 12 months ending on June 30 preceding such computation date shall be refunded. Any such refund shall be made prior to February 1 following such computation date.

Should the balance in such account not equal that requiring a refund, the employer shall upon notice and demand for payment mailed to his last known address pay into his account an amount that will bring such balance to the minimum required for a refund. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment. Any such amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Upon a change in election as to the method of payment from reimbursement to contributions, or upon termination of coverage and after all applicable benefits paid based on wages paid prior to such change in election or termination of coverage have been charged, any credit balance in such account shall be refunded to the employer.

Should there be a debit balance in such account, the employer shall, upon notice and demand for payment, mailed to his last-known address, pay into his account an amount equal to such debit balance. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment.

Any such amount unpaid on the date due shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Beginning January 1, 1978, each employer paying by reimbursement shall have his account computed on computation date (August 1) and if there is a deficit shall be billed for an amount necessary to bring his account to one percent (1%) of his taxable payroll. Any amount of his account in excess of that required to equal one percent (1%) of his payroll shall be refunded. Amounts due from any employer to bring his account to a one percent (1%) balance shall be billed as soon as practical and payment will be due within 25 days from the date of mailing of the statement of amount due.

e. The Commission may make necessary rules and regulations with respect to coverage of a group of nonprofit organizations and with respect to the reimbursement of benefits payments by such group of nonprofit organizations.

(3)a. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to a nonprofit organization which makes payments to the State Unemployment Insurance Fund in lieu of contributions.

b. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service.

(e) In order that the Commission shall be kept informed at all times on the circumstances and conditions of unemployment within the State and as to whether the stability of the fund is being impaired under the operation and effect of the system provided in subsection (c) of this section, the actuarial study now in progress shall be continued and such other investigations and studies of a similar nature as the Commission may deem necessary shall be made.

(f)(1) On and after January 1, 1978, all benefits charged to a State or local governmental employing unit shall be paid to the Commission within 25 days from the date a list of benefit charges is mailed to the State or local governmental employing agency and the appropriate account(s) shall be credited with such payment(s).

(2) In lieu of paying for benefits by reimbursement as provided in subdivision (1) hereof, any State or local governmental employing unit may elect pursuant to rules and regulations established by the Commission:

a. To pay contributions on an experience rating basis as provided in G.S. 96-9(a), (b), and (c); or,

b. To pay to the Commission, within 25 days from the date a list of benefit charges is mailed to such employing unit, a sum equal to the amount which its account would be charged if it were a tax paying employer under G.S. 96-9(c)(2).

(3) State or local governmental employing units paying for benefits as provided in subdivision (1) herein may establish pool accounts; provided, that such pool accounts are established and maintained according to the rules and regulations of the Commission.

(4) Any governmental entity paying by reimbursement as provided in subdivision (1) hereof shall not have any benefits paid against its account noncharged or forgiven except as provided in G.S. 96-9(d)(2)c.

(g) Nothing contained in subsections (d) and (f) of this section shall be construed to prevent the Commission from providing any reimbursing employer with informational bills or lists of charges on a basis more frequent than yearly, if in its sole discretion, the Commission deems such action to be in the best interest of the Commission and the affected employer(s).

(h)(1) Any nonprofit organization which has been paying contributions on a reimbursement basis for at least three consecutive calendar years during none of which years the benefit charges exceeded four tenths of one percent (.4%) of its taxable payroll may, before November 1 of the fourth or subsequent calendar year, elect to pay contributions by special reimbursement on the basis provided for in subdivision (2) below but only upon the following conditions:

a. Benefit charges in the year of election are less than four tenths of one percent (.4%) of taxable payroll.

b. The election shall apply to no less than the four calendar years following the year of election unless terminated by the Commission under subdivision (3) below.

c. All reimbursements during the year of election and the three preceding years were paid when due.

d. The election of special reimbursement shall not entitle the electing nonprofit organization to any refund of any portion of its account balance.

e. No later than January 1 of the first year to which its election applies, the electing nonprofit organization shall furnish the Commission a letter of credit in an amount equal to one hundred fifty percent (150%) of the account balance required under subdivision (2) below.

f. The Commission shall by regulation prescribe the form of the letter of credit and the criteria for the financial institution issuing such letter of credit along with the form of election under this section.

(2) Any qualified nonprofit organization that meets the conditions of subdivision (1) above shall, upon the approval of its election by the Commission, pay contributions by special reimbursement as follows:

a. The organization's account shall have a required minimum balance that shall be computed on August 1 of each calendar year for the following calendar year and shall be equal to the greater of:

1. One-half the largest amount of claims charged to it during any of the three calendar years preceding the computation date; or,

2. One-tenth of one percent (0.1%) of the highest total taxable payroll during any of the three calendar years preceding the computation date.

b. On the first day of each quarter of any calendar year, the Commission shall bill the employer for an amount necessary to bring its account to the required minimum balance, and the amount so billed is due no later than 25 days after the bill is mailed.

(3) If any electing organization shall fail to make any quarterly payment when due:

a. The Commission may draw the full amount of the letter of credit for application to the employer's account;

b. The organization's required minimum balance shall immediately and without notice become the greater of:

1. A sum equal to its current minimum balance plus the full amount of the current letter of credit; or

2. A sum equal to five tenths of one percent (.5%) of its total taxable payroll. Any amount necessary, after the application of any funds drawn from the letter of credit, to bring the employer's account to such balance shall be payable upon demand.

c. If, after demand, the organization shall fail to pay any sums required under paragraph b. above, the Commission may revoke the organization's election for special reimbursement and any difference between the employer's account balance and one percent (1%) of its total taxable payroll shall become immediately due and payable.

d. The Commission may, in addition, exercise any of the powers granted to it in G.S. 96-10 to collect any amount due.

e. Pursuant to such regulations as the Commission may adopt, the Commission shall afford any organization affected by this paragraph a hearing to determine if any increase in the organization's minimum required balance should be reduced, in whole or in part, or if any revocation of a special reimbursement election should be rescinded. If the Commission, in its sole discretion, is satisfied that the conditions giving rise to the increase or revocation have been corrected, it may reduce such increase or rescind such revocation provided that it may require as a condition of such reduction or recision a new letter of credit up to three times the amount normally required.

f. When used in the subsection, "total taxable payroll" means the highest total taxable payroll during the three most recent, completed calendar years. (Sess. 1936, c. 1, s. 7; 1939, c. 27, s. 6; 1941, c. 108, ss. 6, 8; c. 320; 1943, c. 377, ss. 11-14; 1945, c. 522, ss. 11-16; 1947, c. 326, ss. 13-15, 17; c. 881, s. 3; 1949, c. 424, ss. 9-13; c. 969; 1951, c. 322, s. 2; c. 332, ss. 4-7; 1953, c. 401, ss. 12-14; 1955, c. 385, ss. 5, 6; 1957, c. 1059, ss. 5-11; 1959, c. 362, ss. 7, 8; 1965, c. 795, ss. 6-10; 1969, c. 575, ss. 7, 8; 1971, c. 673, ss. 14-20; 1973, c. 172, ss. 2, 3; c. 740, s. 1; 1977, c. 727, ss. 37-49; 1979, c. 660, ss. 13-15; 1981, c. 160, ss. 13-15; c. 534; 1983, c. 585, ss.

1-11; 1985, c. 552, ss. 5-7, 13; 1987, c. 17, ss. 3-7; c. 197; 1987 (Reg. Sess., 1988), c. 999, ss. 2, 3; 1989, c. 583, ss. 4, 6; c. 770, s. 20; 1991, c. 276, s. 1; c. 421, s. 1; c. 458, ss. 2, 3; 1991, Ex. Sess., c. 6, s. 2; 1993, c. 85, s. 1; c. 424, s. 1; 1994, Ex. Sess., c. 10, ss. 1-3.)

Subdivision (a)(7) Set Out Twice. — The first version of subdivision (a)(7) set out above is effective until September 30, 1995. The second version of subdivision (a)(7) set out above is effective September 30, 1995.

Effect of Amendments. —

Session Laws 1994, Extra Session, c. 10, ss. 1 and 2, effective March 10, 1994, and applicable to quarters beginning on or after January 1, 1994, rewrote subdivision (b)(1); rewrote the Fund Ratio Schedules table in subdivision (b)(3)d.; added the subdivision designation (b)(3)d1.; in subdivision (b)(3)d1., substituted "Until January 1, 1994, the" for "The" at the beginning of the second sentence, substituted "this Experience Rating Formula" for "the Experience Rating Formula" in the third sentence; and added subdivision (b)(3)d2.

Session Laws 1994, Extra Session, c. 10, s. 3, effective January 1, 1997, repeals subdivision (b)(3)d1.

§ 96-10. Collection of contributions.

CASE NOTES

Cited in State ex rel. Employment Sec. Comm'n v. IATSE Local 574, 114 N.C. App. 662, 442 S.E.2d 339 (1994).

§ 96-12. Benefits.

(a) Payment of Benefits. — Twenty-four months after the date when contributions first accrue under this Chapter benefits shall become payable from the fund. All benefits shall be paid through employment offices, in accordance with such regulations as the Commission may prescribe.

(b)(1)a. Repealed by Session Laws 1977, c. 727, s. 52.

b. An individual who is totally unemployed shall be paid the individual's weekly benefit amount. The weekly benefit amount for an individual is the amount of the high-quarter wages paid to the individual in the individual's base period, divided by 26 and, if the quotient is not a whole dollar, rounded to the next lower whole dollar. If this amount is less than fifteen dollars ($15.00), the individual is not eligible for benefits.

c. Repealed by Session Laws 1981, c. 160, s. 17.

(2) Each August 1, the Commission shall calculate the maximum weekly benefit amount available to an individual. The maximum weekly benefit amount is sixty-six and two-thirds percent (66 2/3%) of the average weekly insured wage rounded, if the amount is not a whole dollar, to the next lower whole dollar. The maximum weekly benefit amount set on August 1 of a year applies to an individual whose benefit year begins on or after that date and before August 1 of the following year.

(3) Repealed by Session Laws 1981, c. 160, s. 18.

(4) Qualifying Wages for Second Benefit Year. — An individual whose prior benefit year has expired and who files a

new benefit claim is not entitled to benefits unless the individual has been paid qualifying wages since the beginning date of the prior benefit year and before the date the new benefit claim was filed equal to at least 10 times the individual's weekly benefit amount under the new benefit claim. "Qualifying wages" are wages earned with an employer subject to the provisions of this Chapter or some other state employment security law or in federal service as defined in 5 U.S.C. Chapter 85.

(c) Partial Weekly Benefit. — An individual who is partially unemployed or part-totally employed shall be paid a portion of the individual's weekly benefit amount. The portion payable is the difference between the individual's weekly benefit amount and any part of the wages or remuneration that is payable to the individual for a week for which benefits are claimed and that exceeds ten percent (10%) of the individual's average weekly wage in the highest quarter of the individual's base period rounded, if the amount is not a whole dollar, to the next lower whole dollar. Payments received by an individual under a supplemental benefit plan referred to in G.S. 96-8(13)d. do not affect the computation of the individual's partial weekly benefit.

(d) Duration of Benefits. — The total benefits paid to an individual shall not be less than the minimum total benefit and shall not exceed the lesser of the maximum total benefit or the individual's total benefit amount. The total benefit amount for an individual is determined by dividing the individual's base-period wages by the individual's high-quarter wages, multiplying that quotient by eight and two thirds, rounding the result to the nearest whole number, and then multiplying the resulting amount by the individual's weekly benefit amount. The minimum total benefit for an individual is 13 times the individual's weekly benefit amount. The maximum total benefit for an individual is 26 times the individual's weekly benefit amount, unless the benefits are extended further in accordance with subsection (e) of this section. The Commission shall establish and maintain individual wage record accounts for each individual who earns wages in covered employment for as long as the wages would be included in a determination of benefits.

(e) Extended Benefits. — Effective January 1, 1972, extended benefits shall be paid under this Chapter as herein specified:

A. Definitions. — As used in this subsection, unless the context clearly requires otherwise —

(1) "Extended benefit period" means a period which:

(a) Begins the third week after a week for which there is an "on" indicator; and

(b) Ends with either of the following weeks, whichever occurs later:

(I) The third week after the first week for which there is an "off" indicator; or

(II) The 13th consecutive week of such period.

Provided, that no extended benefit period may begin before the 14th week following the end of a prior extended benefit period which was in effect with respect to this State.

(2) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1178, s. 4.

(3) Repealed by Session Laws 1982 (Regular Session, 1982), c. 1178, s. 5.

(4) There is an "on indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediate preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter:
  a. Equalled or exceeded one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and equalled or exceeded five percent (5%), or
  b. Equalled or exceeded six percent (6%).

(5) There is an "off indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter:
  a. Was less than one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and was less than six percent (6%), or
  b. Was less than five percent (5%).

(6) "Rate of insured unemployment," for the purposes of subparagraphs (4) and (5) of this subsection, means the percentage derived by dividing
  a. The average weekly number of individuals filing claims for regular compensation in this State for weeks of unemployment with respect to the most recent 13 consecutive-week period, as determined by the Commission on the basis of its reports to the United States Secretary of Labor, by
  b. The average monthly employment covered under this Chapter for the first four of the most recent six completed calendar quarters ending before the end of such 13-week period.

(7) "Regular benefits" means benefits payable to an individual under this Chapter or any other State law (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) other than extended benefits.

(8) "Extended benefits" means benefits (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) payable to an individual under the provisions of this section for weeks of unemployment in his eligibility period.

(9) "Eligibility period" of an individual means the period consisting of the weeks in his benefit year which begin in an extended benefit period and if his benefit year ends within such extended benefit period, any weeks thereafter which begin in such period.

(10) "Exhaustee" means an individual who, with respect to any week of unemployment in his eligibility period:

a. Has received, prior to such week, all of the regular benefits that were available to him under this Chapter or any other State law (including dependents' allowances and benefits payable to federal civilian employees and ex-servicemen under 5 U.S.C. Chapter 85) in his current benefit year that includes such week;

Provided, that, for the purposes of this subparagraph, an individual shall be deemed to have received all of the regular benefits that were available to him although (1) as a result of a pending appeal with respect to wages that were not considered in the original monetary determination in his benefit year, he may subsequently be determined to be entitled to added regular benefits, or (2) he may be entitled to regular benefits with respect to future weeks of unemployment, but such benefits are not payable with respect to such week of unemployment by reason of the provisions in G.S. 96-16; or

b. His benefit year having expired prior to such week, has no, or insufficient, wages on the basis of which he could establish a new benefit year that would include such week; and

c.(1) Has no right to unemployment benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act, the Trade Expansion Act of 1962, the Automotive Products Trade Act of 1965 and such other federal laws as are specified in regulations issued by the United States Secretary of Labor; and

(2) Has not received and is not seeking unemployment benefits under the unemployment compensation law of Canada; but if he is seeking such benefits and the appropriate agency finally determines that he is not entitled to benefits under such law, he is considered an exhaustee.

(11) "State law" means the unemployment insurance law of any state approved by the United States Secretary of Labor under section 3304 of the Internal Revenue Code of 1954.

B. Effect of State Law Provisions Relating to Regular Benefits on Claims for, and for Payment of, Extended Benefits. — Except when the result would be inconsistent with the other provisions of this section, as provided in the regulations of the Commission, the provisions of this Chapter which apply to claims for, or the payment of, regular benefits shall apply to claims for, and the payment of, extended benefits.

C. Eligibility Requirements for Extended Benefits. — An individual shall be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period only if the Commission finds that with respect to such week:

1. He is an "exhaustee" as defined in subsection A(10).

2. He has satisfied the requirements of this Chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits. Provided, however, that for purposes of disqualification for extended benefits for weeks of unemployment beginning after March 31, 1981, the term "suitable work" means any work which is within the individual's capabilities to perform if: (i) The gross average weekly remuneration payable for the work exceeds the sum of the individual's weekly extended benefit amount plus the amount, if any, of supplemental unemployment benefits (as defined in section 501(C)(17)(D) of the Internal Revenue Code of 1954) payable to such individual for such week; and (ii) the gross wages payable for the work equal the higher of the minimum wages provided by section 6(a)(1) of the Fair Labor Standards Act of 1938 as amended (without regard to any exemption), or the State minimum wage; and (iii) the work is offered to the individual in writing and is listed with the State employment service; and (iv) the considerations contained in G.S. 96-14(3) for determining whether or not work is suitable are applied to the extent that they are not inconsistent with the specific requirements of this subdivision; and (v) the individual cannot furnish evidence satisfactory to the Commission that his prospects for obtaining work in his customary occupation within a reasonably short period of time are good, but if the individual submits evidence which the Commission deems satisfactory for this purpose, the determination of whether or not work is suitable with respect to such individual shall be made in accordance with G.S. 96-14(3) without regard to the definition contained in this subdivision. Provided, further, that no work shall be deemed to be suitable work for an individual which does not accord with the labor standard provisions set forth in this subdivision, but the employment service shall refer any individual claiming extended benefits to any work which is deemed suitable hereunder. Provided, further, that any individual who has been disqualified for voluntarily leaving employment, being discharged for misconduct or substantial fault, or refusing suitable work under G.S. 96-14 and who has had the disqualification terminated, shall have such disqualification reinstated when claiming extended benefits unless the termination of the disqualification was based upon employment subsequent to the date of the disqualification.
3. After March 31, 1981, he has not failed either to apply for or to accept an offer of suitable work, as defined in G.S. 96-12(e)C.2., to which he was referred by an employment office of the Commission, and he has furnished the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work. If an individual is found to be ineli-

gible hereunder, he shall be ineligible beginning with the week in which he either failed to apply for or to accept the offer of suitable work or failed to furnish the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work and such individual shall continue to be ineligible for extended benefits until he has been employed in each of four subsequent weeks (whether or not consecutive) and has earned remuneration equal to not less than four times his weekly benefit amount.

4. Pursuant to section 202(a)(7) of the Federal-State Extended Unemployment Compensation Act of 1970 (P.L. 91-373), as amended by section 202(b)(1) of the Unemployment Compensation Amendments of 1992 (Public Law 102-318), for any week of unemployment beginning after March 6, 1993, and before January 1, 1995, the individual is an exhaustee as defined by federal law and has satisfied the requirements of this Chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits. Provided, the terms and conditions of State law that apply to claims for regular compensation and to the payment thereof shall apply to claims for extended benefits and to the payment thereof.

D. Weekly Extended Benefit Amount. — The weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be an amount equal to the weekly benefit amount payable to him during his applicable benefit year. For any individual who was paid benefits during the applicable benefit year in accordance with more than one weekly benefit amount, the weekly extended benefit amount shall be the average of such weekly benefit amounts rounded to the nearest lower full dollar amount (if not a full dollar amount). Provided, that for any week during a period in which federal payments to states under Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, P.L. 91-373, are reduced under an order issued under Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985, P.L. 99-177, the weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be reduced by a percentage equivalent to the percentage of the reduction in the federal payment. The reduced weekly extended benefit amount, if not a full dollar amount, shall be rounded to the nearest lower full dollar amount.

E.(a) Total Extended Benefit Amount. — Except as provided in subparagraph (b) hereof, the total extended benefit amount payable to any eligible individual with respect to his applicable benefit year shall be the least of the following amounts:

1. Fifty percent (50%) of the total amount of regular benefits which were payable to him under this Chapter in his applicable benefit year; or

2. Thirteen times his weekly benefit amount which was payable to him under this Chapter for a week of total unemployment in the applicable benefit year.

Provided, that during any fiscal year in which federal payments to states under Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, P.L. 91-373, are reduced under an order issued under Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985, P.L. 99-177, the total extended benefit amount payable to an individual with respect to his applicable benefit year shall be reduced by an amount equal to the aggregate of the reductions under G.S. 96-12(e)D and the weekly amounts paid to the individual.

(b) Notwithstanding any other provisions of this Chapter, if the benefit year of any individual ends within an extended benefit period, the remaining balance of extended benefits that such individual would, but for this subparagraph, be entitled to receive in that extended benefit period, with respect to weeks of unemployment beginning after the end of the benefit year, shall be reduced (but not below zero) by the product of the number of weeks for which the individual received any amounts as trade readjustment allowances within that benefit year, multiplied by the individual's weekly benefit amount for extended benefits.

F. Beginning and Termination of Extended Benefit Period. —

1. Whenever an extended benefit period is to become effective in this State as a result of an "on" indicator, or an extended benefit period is to be terminated in this State as a result of an "off" indicator, the Commission shall make an appropriate public announcement; and
2. Computations required by the provisions of subsection A(6) shall be made by the Commission, in accordance with regulations prescribed by the United States Secretary of Labor.

G. Prior to January 1, 1978, any extended benefits paid to any claimant under G.S. 96-12(e) shall not be charged to the account of the base period employer(s) who pay taxes as required by this Chapter. However, fifty percent (50%) of any such benefits paid shall be allocated as provided in G.S. 96-9(c)(2)a (except that G.S. 96-9(c)(2)b shall not apply), and the applicable amount shall be charged to the account of the appropriate employer paying on a reimbursement basis in lieu of taxes.

On and after January 1, 1978, the federal portion of any extended benefits shall not be charged to the account of any employer who pays taxes as required by this Chapter but the State portion of such extended benefits shall be charged to the account of such employer. All state portions of the extended benefits paid shall be charged to the account of governmental entities or other employers not liable for FUTA taxes who are the base period employers.

H. Notwithstanding the provisions of G.S. 96-9(d)(1)a, 96-9(d)(2)c, 96-12(e)G, or any other provision of this Chapter, any extended benefits paid which are one hundred percent (100%) federally financed shall not be charged in any percentage to any employer's account.

I. For weeks of unemployment beginning on or after June 1, 1981, a claimant who is filing an interstate claim under the interstate benefit payment plan shall be eligible for extended benefits for no more than two weeks when there is an "off indicator" in the state where the claimant files.

(f) Any amount payable under any provision of this Chapter when applicable is subject to the retirement reduction required by G.S. 96-14(9). (Ex. Sess. 1936, c. 1, s. 3; 1937, c. 448, s. 1; 1939, c. 27, ss. 1-3, 14; c. 141; 1941, c. 108, s. 1; c. 276; 1943, c. 377, ss. 1-4; 1945, c. 522, ss. 24-26; 1947, c. 326, s. 21; 1949, c. 424, ss. 19-21; 1951, c. 332, ss. 10-12; 1953, c. 401, ss. 17, 18; 1957, c. 1059, ss. 12, 13; c. 1339; 1959, c. 362, ss. 12-15; 1961, c. 454, ss. 17, 18; 1965, c. 795, ss. 15, 16; 1969, c. 575, s. 9; 1971, c. 673, ss. 25, 26; 1973, c. 1138, ss. 3-7; 1975, c. 2, ss. 1-5; 1977, c. 727, s. 52; 1979, c. 660, ss. 18, 19; 1981, c. 160, ss. 17-23; 1981 (Reg. Sess., 1982), c. 1178, ss. 3-14; 1983, c. 585, ss. 12-16; c. 625, ss. 1, 7; 1985, c. 552, s. 9; 1985 (Reg. Sess., 1986), c. 918; 1987, c. 17, s. 8; 1993, c. 122, s. 2; 1993 (Reg. Sess., 1994), c. 680, ss. 1-3.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective August 1, 1994, and applicable to benefits paid to claimants whose benefit year begins on or after that date, rewrote subsections (b), (c), and (d).

§ 96-13. Benefit eligibility conditions.

(a) An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that —

(1) He has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the Commission may prescribe;

(2) He has made a claim for benefits in accordance with the provisions of G.S. 96-15(a);

(3) He is able to work, and is available for work: Provided that, unless temporarily excused by Commission regulations, no individual shall be deemed available for work unless he establishes to the satisfaction of the Commission that he is actively seeking work: Provided further, that an individual customarily employed in seasonal employment shall, during the period of nonseasonal operations, show to the satisfaction of the Commission that such individual is actively seeking employment which such individual is qualified to perform by past experience or training during such nonseasonal period: Provided further, however, that no individual shall be considered available for work for any week not to exceed two in any calendar year in which the Commission finds that his unemployment is due to a vacation. In administering this proviso, benefits shall be paid or denied on a payroll-week basis as established by the employing unit. A week of unemployment due to a vacation as provided herein means any payroll week within which the equivalent of three customary full-time working days consist of a vacation period. For the purpose of this subdivi-

sion, any unemployment which is caused by a vacation period and which occurs in the calendar year following that within which the vacation period begins shall be deemed to have occurred in the calendar year within which such vacation period begins. For the purposes of this subdivision, no individual shall be deemed available for work during any week in which he is registered at and attending an established school, or is on vacation during or between successive quarters or semesters of such school attendance, or on vacation between yearly terms of such school attendance. Except: (i) Any person who was engaged in full-time employment concurrent with his school attendance, who is otherwise eligible, shall not be denied benefits because of school enrollment and attendance. Except: (ii) Any otherwise qualified unemployed individual who is attending a vocational school or training program which has been approved by the Commission for such individual shall be deemed available for work. However, any unemployment insurance benefits payable with respect to any week for which a training allowance is payable pursuant to the provisions of a federal or State law, shall be reduced by the amount of such allowance which weekly benefit amount shall be rounded to the nearest lower full dollar amount (if not a full dollar amount). The Commission may approve such training course for an individual only if:

1. a. Reasonable employment opportunities for which the individual is fitted by training and experience do not exist in the locality or are severely curtailed;
   b. The training course relates to an occupation or skill for which there are expected to be reasonable opportunities for employment; and
   c. The individual, within the judgment of the Commission, has the required qualifications and the aptitude to complete the course successfully; or,
2. Such approval is required for the Commission to receive the benefits of federal law.

(4) No individual shall be deemed able to work under this subsection during any week for which that person is receiving or is applying for benefits under any other State or federal law based on his temporary total or permanent total disability. Provided that if compensation is denied to any individual for any week under the foregoing sentence and such individual is later determined not to be totally disabled, such individual shall be entitled to a retroactive payment of the compensation for each week for which the individual filed a timely claim for compensation and for which the compensation was denied solely by reason of the foregoing sentence.

(5) The individual has participated in reemployment services, if the Division referred the individual to these services after determining, through use of a worker profiling system, that the individual would likely exhaust regular benefits and would need reemployment services to make a successful transition to new employment, unless the individual establishes justifiable cause for failing to participate in the services.

(b)(1) The payment of benefits to any individual based on services for nonprofit organizations, hospitals, or State hospitals and State institutions of higher education, other institutions of higher education, or secondary schools and subdivisions of secondary schools subject to this Chapter shall be in the same manner and under the same conditions of the laws of this Chapter as applied to individuals whose benefit rights are based on other services subject to this Chapter. Except that with respect to services in the educational institutions listed above:

a. In an instructional, research, or principal administrative capacity, compensation shall not be payable based on such services for any week commencing during the period between two successive academic years or terms, or, when an agreement provides instead for a similar period between two regular but not successive terms, during that period, to any individual if he performs such services in the first of the academic years or terms and if there is a contract or reasonable assurance that the individual will perform services in any such capacity for any educational institution in the second of the academic years or terms; and,

b. In any other capacity for an educational institution:

1. Compensation shall be denied on the basis of such services for any week which commences during a period between two successive academic years or terms if the individual performs such services in the first of the academic years or terms and there is a reasonable assurance that the individual will perform such services in the second of the academic years or terms, except that

2. If compensation is denied to any individual for any week under subclause 1 and the individual was not offered an opportunity to perform such services for the educational institution for the second of the academic years or terms, the individual shall be entitled to a retroactive payment of the compensation for each week for which the individual filed a timely claim for compensation and for which compensation was denied solely by reason of subclause 1; and,

c. With respect to any services described in clause a or b, compensation payable on the basis of such services shall be denied to any individual for any week which commences during an established and customary vacation period or holiday recess, and there is a reasonable assurance that such individual will perform such services in the period immediately following the vacation period or holiday recess; and,

d. With respect to any services described in clause a or b, compensation on the basis of services in any such capacity shall be denied as specified in clauses a, b, and c. to any individual who performed such services in an educational institution while in the employ of an educational service agency, and for this purpose the term "educational service agency" means a governmental agency or governmental entity which is established and operated exclusively for the purpose of providing such services to one or more educational institutions; and,

e. With respect to any services to which G.S. 96-13(b)(1) applies, if such services are provided to or on behalf of an educational institution, compensation shall be denied under the same circumstances as described in clauses a through d.

(2) Repealed by Session Laws 1983, c. 625, s. 5.

(c) From January 29, 1975, through February 15, 1977, no week of unemployment for waiting-period credit shall be required of any claimant. Beginning February 16, 1977, an unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that he has been totally, partially, or part-totally unemployed for a waiting period of one week with respect to each benefit year. No week shall be counted as a week of unemployment for waiting-period credit under this provision unless the claimant except for the provisions of this subdivision was otherwise eligible for benefits.

(d) Benefit entitlement based on services for governmental entities that become subject to Employment Security Commission law effective January 1, 1978, will be administered in the same manner and under the same conditions of the laws of this Chapter as are applicable to individuals whose benefit rights are based on other service subject to this Chapter.

(e) Benefits shall not be payable to any individual on the basis of any services, substantially all of which consist of participating in sports or athletic events or training or preparing to so participate, for any week which commences during the period between two successive sport seasons (or similar periods) if such individual performs such services in the first of such seasons (or similar periods) and there is a reasonable assurance that such individual will perform such services in the latter of such seasons (or similar periods).

(f)(1) Benefits shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, or otherwise was permanently residing in the United States under color of law at the time such services were performed, or was lawfully present for purposes of performing such services (including an alien who is lawfully present in the United States as a result of the application of the provisions of section 203 (a)(7) or section 212 (d)(5) of the Immigration and Nationality Act). Any data or information required of individuals applying for benefits to determine whether benefits are not payable to them because of their alien status shall be uniformly required from all applicants for benefits. In the case of an individual whose application for benefits would otherwise be approved, no determination that compensation to such individual is not payable because of his alien status shall be made except upon a preponderance of the evidence.

(2) An individual who is not a citizen or national of the United States shall not be deemed available for work under subsection (a)(3) of this section unless the individual is in sat-

isfactory immigration status under the laws administered by the United States Department of Justice, Immigration and Naturalization Service.

(g)(1) Except as herein provided, no individual shall be eligible for benefits for any week during any part of which the Commission finds that work was not available to the individual because he had been placed on a bona fide disciplinary suspension by his employer. To be bona fide, a disciplinary suspension must be based on acts or omissions which constitute fault on the part of the employee and are connected with the work but such acts or omissions need not alone be disqualifying under G.S. 96-14.

(2) Ineligibility pursuant to the preceding paragraph based on a single disciplinary suspension shall not be imposed for any claims week beginning after the tenth consecutive calendar day of the suspension. If at the time a claim is filed for such a week the individual is still so suspended, the individual shall be deemed to have been discharged from his work because of all the acts or omissions that caused his suspension and the issue of whether that discharge was for disqualifying reasons under G.S. 96-14 shall then be adjudicated pursuant to G.S. 96-15.

(3) Any individual who files a claim for benefits for a week with respect to which he is ineligible under this subsection is deemed to be attached to his employer's payroll and any issue concerning separation from work that may be present under G.S. 96-14 shall be held in abeyance until such time as a claim is filed for a week to which this subsection does not apply. (Ex. Sess. 1936, c. 1, s. 4; 1939, c. 27, ss. 4, 5; c. 141; 1941, c. 108, s. 2; 1943, c. 377, s. 5; 1945, c. 522, ss. 27-28; 1947, c. 326, s. 22; 1949, c. 424, s. 22; 1951, c. 332, s. 13; 1961, c. 454, s. 19; 1965, c. 795, ss. 17, 18; 1969, c. 575, ss. 10, 11; 1971, c. 673, ss. 27, 28; 1973, c. 172, s. 6; 1975, c. 2, s. 6; c. 8, ss. 1, 2; c. 226, ss. 1, 2; 1977, c. 727, s. 53; 1979, c. 660, ss. 20, 21, 29-31; 1981, c. 160, ss. 24, 25; c. 883; 1983, c. 585, s. 17; c. 625, ss. 2-5; 1985, c. 53; c. 197, ss. 4, 5; c. 552, ss. 10, 11; c. 616, s. 2; 1989, c. 707, s. 3; c. 770, s. 22; 1991, c. 423, s. 1; 1993 (Reg. Sess., 1994), c. 680, s. 5.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective July 5, 1994, added subdivision (a)(5).

CASE NOTES

Seasonal agricultural workers (SAW) are eligible to receive state unemployment insurance benefits. State ex rel. Emp. Sec. Comm'n v. Hopkins, 111 N.C. App. 437, 432 S.E.2d 703 (1993).

Cited in Gilliam v. Employment Sec. Comm'n, 110 N.C. App. 796, 431 S.E.2d 772 (1993).

§ 96-14. Disqualification for benefits.

CASE NOTES

II. Leaving Work Voluntarily Without Good Cause.
III. Misconduct.

II. LEAVING WORK VOLUNTARILY WITHOUT GOOD CAUSE.

"Attributable to the Employer." — Respondent employer's moving of its plant was "good cause attributable to the employer" for petitioner's leaving her job, and she should not have been disqualified from receiving unemployment benefits. Watson v. Employment Sec. Comm'n, 111 N.C. App. 410, 432 S.E.2d 399 (1993).

III. MISCONDUCT.

Assault upon Co-Worker. — Where worker's assault on co-worker was purely retaliatory and combative, it was the type of misconduct which would disqualify an individual from employment benefits, even though petitioner reacted in the heat of anger. Fair v. St. Joseph's Hosp., 113 N.C. App. 159, 437 S.E.2d 875 (1993).

§ 96-15. Claims for benefits.

CASE NOTES

Applied in Gilliam v. Employment Sec. Comm'n, 110 N.C. App. 796, 431 S.E.2d 772 (1993); Fair v. St. Joseph's Hosp., 113 N.C. App. 159, 437 S.E.2d 875 (1993).

§ 96-15.2. (Effective October 1, 1994 — See editor's note) Protection of witness before the Employment Security Commission.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 96-18. (See editor's note for date change) Penalties.

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

Cited in Gilliam v. Employment Sec. Comm'n, 110 N.C. App. 796, 431 S.E.2d 772 (1993).

ARTICLE 3.

Employment Service Division.

§ 96-21. Duties concerning veterans and worker profiling.

The duties of the Employment Service Division include the following:

(1) To cooperate with all State and federal agencies in attempting to secure suitable employment and fair treatment for military veterans and disabled veterans.

(2) To establish and use a worker profiling system that complies with 42 U.S.C. § 503(a)(10) to identify claimants for benefits whom the Division must refer to reemployment services in accordance with that law. (1921, c. 131, s. 3; C.S., s. 7312(c); Ex. Sess. 1936, c. 1, s. 12; 1979, c. 660, s. 26; 1993 (Reg. Sess., 1994), c. 680, s. 6.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective July 5, 1994, rewrote the section catchline and rewrote the section, in part by adding subdivision (2).

Chapter 97.

Workers' Compensation Act.

Article 1.

Workers' Compensation Act.

Sec.

97-2. Definitions.

97-6.1. [Repealed.]

97-18. Prompt payment of compensation required; installments; payment without prejudice; notice to Commission; penalties.

97-18.1. Termination or suspension of compensation benefits.

97-19. Liability of principal contractors; certificate that subcontractor has complied with law; right to recover compensation of those who would have been liable; order of liability.

97-21. (Effective October 1, 1994 — See editor's note) Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation void; unlawful deduction by employer.

97-24. Right to compensation barred after two years; destruction of records.

97-25.1. Limitation of duration of medical compensation.

97-25.2. Managed care organizations.

97-25.3. Preauthorization.

97-25.4. Utilization guidelines for medical treatment.

97-25.5. Utilization guidelines for vocational and other rehabilitation.

97-26. Fees allowed for medical treatment; malpractice of physician.

97-26.1. Fees for medical records and reports; expert witnesses.

97-32.1. Trial return to work.

97-40.1. Second Injury Fund.

97-42. Deduction of payments.

97-47.1. Payment without prejudice; limitations period.

97-60. (Effective October 1, 1994 — See editor's note) Examination of employees by advisory medical committee; designation of industries with dust hazards.

Sec.

97-73. Expenses of making examinations.

97-76. (Effective October 1, 1994 — See editor's note) Inspection of hazardous employments; refusal to allow inspection made misdemeanor.

97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.

97-77.1. [Expires July 1, 1997] Advisory council.

97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.

97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

97-81. Blank forms and literature; statistics; safety provisions; accident reports; studies and investigations and recommendations to General Assembly; to cooperate with other agencies for prevention of injury.

97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval; direct payment as award.

97-83. Commission is to make award after hearing.

97-83.1. Facilities for hearings; security.

97-86. Award conclusive as to facts; appeal; certified questions of law.

97-88.2. Penalty for misrepresentation.

97-88.3. Penalty for health care providers.

97-90. (See editor's note for date change) Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims; agreement for fee or compensation.

97-92. Employer's record and report of accidents; records of Com-

Sec.
mission not open to public; supplementary report upon termination of disability; penalty for refusal to make report; when insurance carrier liable.
97-93. Employers required to carry insurance or prove financial ability to pay for benefits; employers required to post notice; self-insured employers regulated by Commissioner of Insurance.
97-94. Employers required to give proof that they have complied with preceding section; penalty for not keeping liability insured; review; liability for compensation; failure to secure payment of compensation a misdemeanor.
97-99. Law written into each insurance policy; form of policy to be approved by Commissioner of Insurance; cancellation; single catastrophe hazards.
97-100. Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; returned or canceled premiums; reports of premiums collected; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices to carrier; employer who carries own risk shall make report on payroll.

Article 3.

Security Funds.

97-105 through 97-122. [Repealed.]

ARTICLE 1.

Workers' Compensation Act.

§ 97-1. Short title.

Cross References. — As to the inapplicability of this chapter to prisoners working pursuant to § 162-58, see § 162-61.

Editor's Note. — Session Laws 1993, c. 40, s. 1, effective May 5, 1993, provides: "All insurers writing workers' compensation insurance in this State and groups that self-insure their workers' compensation liabilities in this State, shall file with the commissioner by October 1, 1993, their loss control and accident prevention consultation services plans."

Legal Periodicals. —

For note, "Workers' Compensation — Death Knell of a Good Samaritan!," commenting on Culpepper v. Fairfield Sapphire Valley, 93 N.C. App. 242, 377 S.E.2d 777 (1989), see 12 Campbell L. Rev. 121 (1989).

For note, "The Intentional-Tort Exception to the Workers' Compensation Exclusive Remedy Immunity Provisions: Woodson v. Rowland," see 70 N.C.L. Rev. 849 (1992).

For note, "North Carolina's Expansion of the Definition of 'Intentional' in Exceptions to the Exclusivity of Workers' Compensation: Is Legislative Action 'Substantially Certain' to Follow? — Woodson v. Rowland", see 27 Wake Forest L. Rev. 797 (1992).

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

CASE NOTES

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992).

§ 97-2. Definitions.

When used in this Article, unless the context otherwise requires —

(1) Employment. — The term "employment" includes employment by the State and all political subdivisions thereof, and all public and quasi-public corporations therein and all private employments in which three or more employees are regularly employed in the same business or establishment or in which one or more employees are employed in activities which involve the use or presence of radiation, except agriculture and domestic services, unless 10 or more full-time nonseasonal agricultural workers are regularly employed by the employer and an individual sawmill and logging operator with less than 10 employees, who saws and logs less than 60 days in any six consecutive months and whose principal business is unrelated to sawmilling or logging.

(2) Employee. — The term "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, and as relating to those so employed by the State, the term "employee" shall include all officers and employees of the State, including such as are elected by the people, or by the General Assembly, or appointed by the Governor to serve on a per diem, part-time or fee basis, either with or without the confirmation of the Senate; as relating to municipal corporations and political subdivisions of the State, the term "employee" shall include all officers and employees thereof, including such as are elected by the people. The term "employee" shall include members of the North Carolina national guard, except when called into the service of the United States, and members of the North Carolina State guard, and members of these organizations shall be entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duty under orders of the Governor. The term "employee" shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs, whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full-time basis or a part-time basis, and including deputy sheriffs appointed to serve in an emergency, but as to those so appointed, only during the continuation of the emergency. The sheriff shall furnish to the board of county commissioners a complete list of all deputy sheriffs named or appointed by him immediately after their appointment, and notify the board of commissioners of any changes made therein promptly after such changes are made. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representative, de-

pendents, and other persons to whom compensation may be payable: Provided, further, that any employee as herein defined of a municipality, county, or of the State of North Carolina while engaged in the discharge of his official duty outside the jurisdictional or territorial limits of the municipality, county, or the State of North Carolina and while acting pursuant to authorization or instruction from any superior officer, shall have the same rights under this Article as if such duty or activity were performed within the territorial boundary limits of his employer.

Every executive officer elected or appointed and empowered in accordance with the charter and bylaws of a corporation shall be considered as an employee of such corporation under this Article.

Any such executive officer of a corporation may, notwithstanding any other provision of this Article, be exempt from the coverage of the corporation's insurance contract by such corporation specifically excluding such executive officer in such contract of insurance and the exclusion to remove such executive officer from the coverage shall continue for the period such contract of insurance is in effect, and during such period such executive officers thus exempted from the coverage of the insurance contract shall not be employees of such corporation under this Article.

All county agricultural extension service employees who do not receive official federal appointments as employees of the United States Department of Agriculture and who are field faculty members with professional rank as designated in the memorandum of understanding between the North Carolina Agricultural Extension Service, North Carolina State University, A & T State University and the boards of county commissioners shall be deemed to be employees of the State of North Carolina. All other county agricultural extension service employees paid from State or county funds shall be deemed to be employees of the county board of commissioners in the county in which the employee is employed for purposes of workers' compensation.

The term employee shall also include members of the Civil Air Patrol currently certified pursuant to G.S. 143B-491(a) when performing duties in the course and scope of a State approved mission pursuant to Article 11 of Chapter 143B.

Employee shall not include any person performing voluntary service as a ski patrolman who receives no compensation for such services other than meals or lodging or the use of ski tow or ski lift facilities or any combination thereof.

Any sole proprietor or partner of a business whose employees are eligible for benefits under this Article may elect to be included as an employee under the workers' compensation coverage of such business if he is actively engaged in the operation of the business and if the insurer is notified of his election to be so included. Any such sole proprietor or partner shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this Article.

(3) Employer. — The term "employer" means the State and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment and the legal representative of a deceased person or the receiver or trustee of any person. The board of commissioners of each county of the State, for the purposes of this law, shall be considered as "employer" of all deputy sheriffs serving within such county, or persons serving or performing the duties of a deputy sheriff, whether such persons are appointed by the sheriff or by the board of commissioners and whether serving on a fee basis or salary basis. Each county is authorized to insure its compensation liability for deputy sheriffs to the same extent it is authorized to insure other compensation liability for employees thereof.

(4) Person. — The term "person" means individual, partnership, association or corporation.

(5) Average Weekly Wages. — "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, including the subsistence allowance paid to veteran trainees by the United States government, provided the amount of said allowance shall be reported monthly by said trainee to his employer, divided by 52; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract they shall be deemed a part of his earnings.

Where a minor employee, under the age of 18 years, sustains a permanent disability or dies leaving dependents surviving, the compensation payable for permanent disability or death shall be calculated, first, upon the average weekly wage paid to adult employees employed by the same employer at the time of the accident in a similar or like class of work which the injured minor employee would probably have been promoted to if not injured, or, second, upon a wage sufficient to yield the maximum weekly compensation benefit. Compensation for temporary total disability or for the death of a minor without dependents shall be computed upon the average weekly wage at the time of the accident, unless the total disability extends more than 52 weeks and then the compensation may be increased in proportion to his expected earnings.

In case of disabling injury or death to a volunteer fireman or member of an organized rescue squad or duly appointed and sworn member of an auxiliary police department organized pursuant to G.S. 160A-282 or senior members of the State Civil Air Patrol functioning under Article 11, Chapter 143B, under compensable circumstances, compensation payable shall be calculated upon the average weekly wage the volunteer fireman or member of an organized rescue squad or member of an auxiliary police department or senior member of the State Civil Air Patrol was earning in the employment wherein he principally earned his livelihood as of the date of injury. Provided, however, that the minimum compensation payable to a volunteer fireman, member of an organized rescue squad or sworn member of an auxiliary police department organized pursuant to G.S. 160A-282, or senior members of the State Civil Air Patrol shall be sixty-six and two thirds percent (66$^2/_3$%) of the maximum weekly benefit established in G.S. 97-29.

(6) Injury. — "Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident. With respect to back injuries, however, where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident. Injury shall include breakage or damage to eyeglasses, hearing aids, dentures, or other prosthetic devices which function as part of the body; provided, however, that eyeglasses and hearing aids will not be replaced, repaired, or otherwise compensated for unless injury to them is incidental to a compensable injury.

(7) Carrier. — The term "carrier" or "insurer" means any person or fund authorized under G.S. 97-93 to insure under this Article, and includes self-insurers.

(8) Commission. — The term "Commission" means the North Carolina Industrial Commission, to be created under the provisions of this Article.

(9) Disability. — The term "disability" means incapacity because of injury to earn the wages which the employee was

receiving at the time of injury in the same or any other employment.

(10) Death. — The term "death" as a basis for a right to compensation means only death resulting from an injury.

(11) Compensation. — The term "compensation" means the money allowance payable to an employee or to his dependents as provided for in this Article, and includes funeral benefits provided herein.

(12) Child, Grandchild, Brother, Sister. — The term "child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild," "brother," and "sister" include only persons who at the time of the death of the deceased employee are under 18 years of age.

(13) Parent. — The term "parent" includes stepparents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(14) Widow. — The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

(15) Widower. — The term "widower" includes only the decedent's husband living with or dependent for support upon her at the time of her death or living apart for justifiable cause or by reason of her desertion at such time.

(16) Adoption. — The term "adoption" or "adopted" means legal adoption prior to the time of the injury.

(17) Singular. — The singular includes the plural and the masculine includes the feminine and neuter.

(18) Hernia. — In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:

a. That there was an injury resulting in hernia or rupture.
b. That the hernia or rupture appeared suddenly.
c. Repealed by Session Laws 1987, c. 729, s. 2, effective August 5, 1987.
d. That the hernia or rupture immediately followed an accident. Provided, however, a hernia shall be compensable under this Article if it arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned.
e. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

All hernia or rupture, inguinal, femoral or otherwise, so proven to be the result of an injury by accident arising out of and in the course of employment, shall be treated in a surgical manner by a radical operation. If death results from such operation, the death shall be considered as a result of the injury, and compensation paid in accordance with the provisions of G.S. 97-38. In nonfatal cases, if it is shown by special examination, as provided in G.S. 97-27, that the injured employee has a disability resulting after the operation, compensation for such disability shall be paid in accordance with the provisions of this Article.

In case the injured employee refuses to undergo the radical operation for the cure of said hernia or rupture, no compensation will be allowed during the time such refusal continues. If, however, it is shown that the employee has some chronic disease, or is otherwise in such physical condition that the Commission considers it unsafe for the employee to undergo said operation, the employee shall be paid compensation in accordance with the provisions of this Article.

(19) Medical Compensation. — The term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

(20) Health care provider. — The term "health care provider" means physician, hospital, pharmacy, chiropractor, nurse, dentist, podiatrist, physical therapist, rehabilitation specialist, psychologist, and any other person providing medical care pursuant to this Article.

(21) Managed care organization. — The term "managed care organization" means a preferred provider organization or a health maintenance organization regulated under Chapter 58 of the General Statutes. (1929, c. 120, s. 2; 1933, c. 448; 1939, c. 277, s. 1; 1943, c. 543; c. 672, s. 1; 1945, c. 766; 1947, c. 698; 1949, c. 399; 1953, c. 619; 1955, c. 644; c. 1026, s. 1; c. 1055; 1957, c. 95; 1959, c. 289; 1961, cc. 231, 235; 1967, c. 1229, s. 1; 1969, c. 206, s. 2; c. 707; 1971, c. 284, s. 1; c. 1231, s. 1; 1973, c. 521, ss. 1, 2; c. 763, ss. 1-3; c. 1291, s. 14; 1975, c. 266, s. 1; c. 284, ss. 2, 3; c. 288; c. 718, s. 3; c. 817, s. 1; 1977, c. 419; c. 893, s. 1; 1979, cc. 86, 374; c. 516, ss. 4, 5; c. 714, s. 3; 1981, c. 421, ss. 1, 2; 1983, c. 833; 1983 (Reg. Sess., 1984), c. 1042, s. 1; 1985, cc. 133, 144; 1987, c. 729, ss. 1, 2; 1991, c. 703, s. 1; 1993, c. 389, s. 3; 1993 (Reg. Sess., 1994), c. 679, ss. 2.6, 10.7.)

Effect of Amendments. — The 1993 amendment, effective July 18, 1993, in the third paragraph from the end of subdivision (2), deleted "senior" following "shall also include", deleted "18 years of age or older" following "Civil Air Patrol", deleted "and" preceding "currently certified" and deleted "requested and" following "scope of a State".

Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 2.6, "The Workers' Compensation Reform Act of 1994," effective July 5, 1994, and applicable to claims pending on or filed after that that date, added "and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances" at the end of subdivision (19).

Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 10.7, "The Workers' Compensation Reform Act of 1994," effective July 5, 1994, added subdivisions (20) and (21).

Legal Periodicals. —

For note, "North Carolina's Expansion of the Definition of 'Intentional' in Exceptions to the Exclusivity of Workers' Compensation: Is Legislative Action 'Substantially Certain' to Follow? — Woodson v. Rowland", see 27 Wake Forest L. Rev. 797 (1992).

CASE NOTES

- I. In General.
- II. Employment, Employees, and Employers.
  - H. Apprentices.
  - K. National Guard.
- III. Average Weekly Wages.
  - A. In General.
- V. Accident.
- VI. Arising Out of and in the Course of Employment.
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- XV. Hernia.
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- XVII. Disability.
- XVIII. Burden of Proof and Evidence.
- XXI. Widow and Widower.

I. IN GENERAL.

Civil Action Allowed for Employer's Misconduct Substantially Certain to Cause Injury or Death. — When an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer as well as a claim for workers' compensation as such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Workers' Compensation Act. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Election Between Remedies Not Required. — A claimant may, but is not required to, elect between a civil remedy and a remedy under the Workers' Compensation Act but, in any event, is entitled to but one recovery. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Woodson v. Rowland Applies Retroactively. — The Supreme Court's decision in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), which is annotated above, applies retroactively, even though the Woodson court was silent on whether its decision was to operate retroactively. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Co-employee Civil Liability. — The Workers' Compensation Act does not bar an employee from suing a co-employee for injuries caused by willful, wanton, and reckless negligence. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Refusal to Accept Tendered Work. — Defendant's argument that the plaintiff was not disabled within the meaning of subsection (9) because they offered him employment consistent with his medical limitations (one functional arm) at no reduction in salary and that plaintiff was barred from compensation for total disability because he unjustifiably refused the tendered employment suitable to his capacity, was rejected. Bowden v. Boling Co., 110 N.C. App. 226, 429 S.E.2d 394 (1993).

Stated in Gilliam v. Perdue Farms, 112 N.C. App. 535, 435 S.E.2d 780 (1993).

Cited in Postell v. B & D Constr. Co., 104 N.C. App. 1, 411 S.E.2d 413 (1992); Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); Matthews v. Petroleum Tank Serv., Inc., 108 N.C. App. 259, 423 S.E.2d 532 (1992).

II. EMPLOYMENT, EMPLOYEES, AND EMPLOYERS.

H. Apprentices.

While plaintiff may have been a student at a technical institute, when he entered the hospital to perform respiratory therapy, his status changed to apprentice, making him subject to the Workers' Compensation Act. Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487, cert. denied, 333 N.C. 169, 424 S.E.2d 406 (1992).

K. National Guard.

Injury During Initial Training. — Plaintiff was an employee of the State when he was injured at federal mandatory initial training, required before serving as a member of the National Guard by 10 U.S.C. 511(d) (which did not exist when the second sentence of this subsection was written), and accordingly was entitled to compensation under the Worker's Compensation Act because his injury arose out of and in the course of his employment with the National Guard. Britt v. North Carolina Dep't of Crime Control & Pub. Safety, 108 N.C. App. 777, 425 S.E.2d 11 (1993).

Weekend Drill. — Plaintiff, injured while performing his duties as a member of the National Guard on a routine weekend drill, was entitled to worker's compensation for injuries. Duncan v. North Carolina Dep't of Crime Control & Pub. Safety, 113 N.C. App. 184, 437 S.E.2d 654 (1993).

III. AVERAGE WEEKLY WAGES.

A. In General.

Most Accurate Reflection. — The Industrial Commission correctly determined claimant's earning capacity as an independent contractor under the fourth method listed in subsection (5) by averaging plaintiff's net income for the years 1988 and 1989; this interpretation most accurately reflected claimant's earning capacity. Holloway v. T.A. Mebane, Inc., 111 N.C. App. 194, 431 S.E.2d 882 (1993).

V. ACCIDENT.

Plaintiff, who had been employed by defendant for five years in an office job before her work-related injury and who testified that she was not yet proficient in defendant's filling department, was not performing her usual work routine at the time of accidental injury on her fifth day on the production line; thus, the commission's conclusion that the plaintiff suffered an injury by accident was accordingly upheld. Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

VI. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

B. Arising Out of.

Stroke as Cause of Accident. — If decedent's stroke did cause automobile accident, decedent's accident arose out of his employment if decedent was in the course of his employment at the time of the accident. Murray v. Associated Insurers, Inc., 114 N.C. App. 506, 442 S.E.2d 370 (1994).

C. In the Course of.

Living in Company Housing. — Where migrant farm worker who lived in company housing was injured while taking a shower after work, although the nature of his employment arguably required that he live on the premises, at the time of his injury he was not on call, and the connection between his employment and his injury was not sufficient to establish that the injury arose out of and in the course of his employment. Jauregui v. Carolina Vegetables, 112 N.C. App. 593, 436 S.E.2d 268 (1993).

VII. INJURIES WHILE ACTING FOR BENEFIT OF SELF OR THIRD PERSON.

Dual Purpose of Trip. — If the Industrial Commission found that plaintiffs' witnesses' testimony established that decedent had a business purpose for his trip, under the dual purpose rule, decedent was in the course of his employment during the trip even though he had additional personal motivations for making the trip as long as he was on the direct route he would have had to take to accomplish the business purpose. Murray v. Associated Insurers, Inc., 114 N.C. App. 506, 442 S.E.2d 370 (1994).

VIII. INJURIES WHILE GOING TO AND FROM WORK.

A. In General.

Accident Returning from Meeting Held Not Part of Duties. — Although plaintiff's presence was required at a meeting after which his accident occurred, his travel from that meeting should not be included within the scope of his employment duties. Being required to drive one's car to a meeting is no different from being required to drive one's car to work. When plaintiff left the meeting he was not traveling to a destination required by his employer nor was he engaged in the furtherance of his employer's business. Wright v. Wake County Pub. Schs., 103 N.C. App. 282, 405 S.E.2d 228 (1991).

XV. HERNIA.

Legislative Use of the Term. — The medical condition known as "hernia" is not specifically defined in either the Worker's Compensation Act or in the case law. Although the Court of Appeals has declined to define the term hernia, it has noted that the legislature's use of the term hernia in conjunction with the word rupture in the statute, "hernia or rupture," seems to indicate that something less than full extension through the organ wall is contemplated. Pernell v. Piedmont Circuits, 104 N.C. App. 289, 409 S.E.2d 618 (1991), cert. denied, 330 N.C. 613, 412 S.E.2d 87 (1992).

XVI. ILLUSTRATIVE CASES.

D. Miscellaneous Cases.

Subarachnoid Hemorrhage. — Where the evidence indicated that decedent died from a subarachnoid hemorrhage, which is not a compensable cause, the presumption of compensability was not applicable and the Commission did not err by not applying it. Gilbert v. Entenmann's, Inc., 113 N.C. App. 619, 440 S.E.2d 115 (1994).

XVII. DISABILITY.

In order to prove disability the burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions. i.e. age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury. Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 425 S.E.2d 454 (1993).

XVIII. BURDEN OF PROOF AND EVIDENCE.

Evidence of Effort to Find other Employment. — An injured employee seeking an award of total disability under this section who is unemployed, medically able to work, and possesses no preexisting limitations which would render him unemployable, must produce evidence of reasonable effort to find other employment. Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 425 S.E.2d 454 (1993).

Commission's Factual Determinations Binding Upon Court. — Whether a plaintiff was injured by accident and had a reasonable excuse for not giving the employer timely notice were factual issues that depended entirely upon her credibility. Since the Commission found, as its prerogative as fact finder permitted, that plaintiff's testimony was not credible, that determination was binding upon the Court of Appeals. Elliot v. A.O. Smith Corp., 103 N.C. App. 523, 405 S.E.2d 799 (1991).

XXI. WIDOW AND WIDOWER.

Presumption of Dependency. — By statute, a widow is conclusively presumed to be wholly dependent for support upon the deceased employee, and shall receive benefits under the

Workers' Compensation Act. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

"Justifiable Cause" for Living Separate and Apart. —

There is no specific formula for the definition of "justifiable cause" under the statute. A court must consider the complexity and history of the particular relationship in order to determine whether the marital partners were separated for justifiable cause in the months before the death of a recipient of benefits. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

Adultery. — A wife's adulterous affair did not bar her from qualifying as her husband's widow under subdivision (14) of this section and § 97-39. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

It is not within the authority of courts to create an exception to subdivision (14) of this section and § 97-39 based upon adultery by a spouse. To find that the legislature intended such an exception, it must be apparent in the statute. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

§ 97-6.1: Repealed by 1991 (Regular Session, 1992), c. 1021, s. 4, effective October 1, 1992.

Cross References. — For present provisions regarding the subject matter of the repealed section, see § 95-240 et seq.

§ 97-9. Employer to secure payment of compensation.

Legal Periodicals. —

For note, "North Carolina's Expansion of the Definition of 'Intentional' in Exceptions to the Exclusivity of Workers' Compensation: Is Legislative Action 'Substantially Certain' to Follow? — Woodson v. Rowland", see 27 Wake Forest L. Rev. 797 (1992).

For comment, "From Andrews to Woodson and Beyond: The Development of the Intentional Tort Exception to the Exclusive Remedy Provision—Rescuing North Carolina Workers from Treacherous Waters," see 20 N.C. Cent. L.J. 164 (1992).

CASE NOTES

Civil Action Allowed for Employer's Misconduct Substantially Certain to Cause Injury or Death. — When an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer as well as a claim for workers' compensation as such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Workers' Compensation Act. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Employee Failed to Establish Tortious Conduct by Employer. — Where plaintiff failed to produce any supporting materials as evidence to support her claim that her injury resulted from tortious conduct by defendant employer, she failed to present a genuine issue of fact sufficient to support a civil action against her employer for an intentional tort. Owens v. W.K. Deal Printing, Inc., 113 N.C. App. 324, 438 S.E.2d 440 (1994).

Effect of Release Agreement on Employee's Remedies. — Once a plaintiff signs a release agreement to settle a workers' compensation claim that plaintiff is not automatically precluded from recovering pursuant to Woodson v. Rowland, 329 N.C. 33, 407 S.E.2d 222 (1991), and does not automatically admit the injury was solely accidental to the exclusion of a claim against an employer for tortious conduct. Owens v. W.K. Deal Printing, Inc., 113 N.C. App. 324, 438 S.E.2d 440 (1994).

Election Between Remedies Not

Required. — A claimant may, but is not required to, elect between a civil remedy and a remedy under the Workers' Compensation Act but, in any event, is entitled to but one recovery. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Woodson v. Rowland Applies Retroactively. — The Supreme Court's decision in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), which is annotated above, applies retroactively, even though the Woodson court was silent on whether its decision was to operate retroactively. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Co-employee Civil Liability. — The Workers' Compensation Act does not bar an employee from suing a co-employee for injuries caused by willful, wanton, and reckless negligence. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Cited in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992); Bynum v. Frederickson Motor Express Corp., 112 N.C. App. 125, 434 S.E.2d 241 (1993).

§ 97-10.1. Other rights and remedies against employer excluded.

Legal Periodicals. —

For note, "A New Exception to the Exclusivity Provision of the North Carolina Workers' Compensation Act — Woodson v. Rowland," see 14 Campbell L. Rev. 261 (1992).

For note, "North Carolina's Expansion of the Definition of 'Intentional' in Exceptions to the Exclusivity of Workers' Compensation: Is Legislative Action 'Substantially Certain' to Follow? — Woodson v. Rowland", see 27 Wake Forest L. Rev. 797 (1992).

CASE NOTES

Civil Action Allowed for Employer's Misconduct Substantially Certain to Cause Injury or Death. — When an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer as well as a claim for workers' compensation as such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Workers' Compensation Act. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Election Between Remedies Not Required. — A claimant may, but is not required to, elect between a civil remedy and a remedy under the Workers' Compensation Act but, in any event, is entitled to but one recovery. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Woodson v. Rowland Applies Retroactively. — The Supreme Court's decision in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), which is annotated above, applies retroactively, even though the Woodson court was silent on whether its decision was to operate retroactively. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Co-employee Civil Liability. — The Workers' Compensation Act does not bar an employee from suing a co-employee for injuries caused by willful, wanton, or reckless negligence. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Student Performing Respiratory Therapy at Hospital Gained Apprentice Status. — While plaintiff may have been a student at technical institute, when he entered the hospital to perform respiratory therapy, his status changed to apprentice, making him subject to the Workers' Compensation Act. Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487, cert. denied, 333 N.C. 169, 424 S.E.2d 406 (1992).

Summary Judgment Appropriate. — In an action by employee against employer seeking compensatory and punitive damages for accident that occurred at work, the trial court did not err in granting defendant's motion for summary judgment, because no genuine issue of material fact existed as to whether defendant engaged in intentional misconduct knowing this conduct was substantially certain to cause death or serious injury to plaintiff. Vaughan v. J.P. Taylor Co., 114 N.C. App. 651, 442 S.E.2d 538 (1994).

Cited in Amos v. Oakdale Knitting Co., 331 N.C. 348, 416 S.E.2d 166 (1992); Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992); Bynum v. Frederickson Motor Express Corp., 112 N.C. App. 125, 434 S.E.2d 241 (1993).

§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

Legal Periodicals. —

For note, "A New Exception to the Exclusivity Provision of the North Carolina Workers' Compensation Act — Woodson v. Rowland," see 14 Campbell L. Rev. 261 (1992).

CASE NOTES

I. In General.
II. Respective Liability of Third Party, Employer and Carrier.
III. Parties and Procedure.
IV. Disbursement of Proceeds.

I. IN GENERAL.

Choice of Law. —

Where all the parties were North Carolina citizens; the plaintiff's contract of employment and the contracts giving rise to the workers' compensation coverage were signed in North Carolina; and the plaintiff was receiving benefits under our workers' compensation statute, North Carolina's interests in implementing the protections afforded by its statute were paramount. An employee's temporary presence in Virginia so as to carry out his employment contract did not strip him of the rights he otherwise enjoyed under the North Carolina workers' compensation statute with regard to the breadth of North Carolina's exclusive remedy bar on common law actions in tort. Braxton v. Anco Elec., Inc., 330 N.C. 124, 409 S.E.2d 914 (1991).

Applied in Sheppard v. Zep Mfg. Co., 114 N.C. App. 25, 441 S.E.2d 161 (1994).

II. RESPECTIVE LIABILITY OF THIRD PARTY, EMPLOYER AND CARRIER.

The workers' compensation carrier for plaintiffs had a subrogation lien on the uninsured motorist policy proceeds paid to plaintiff employee who was injured in an automobile accident occurring while within the scope of employment. Bailey v. Nationwide Mut. Ins. Co., 112 N.C. App. 47, 434 S.E.2d 625 (1993).

III. PARTIES AND PROCEDURE.

The workers' compensation benefits received by plaintiff under Virginia's Workers' Compensation Act should have been allowed into evidence pursuant to subsection (e) in plaintiff's third party personal injury action. Frugard v. Pritchard, 112 N.C. App. 84, 434 S.E.2d 620 (1993), cert. granted, 335 N.C. 554, 441 S.E.2d 113 (1994).

Retroactive Application. — The trial court's application of the amended version of this section deprived employer and insurer of vested rights under lien and, thus, was unconstitutionally retroactive. Fogleman v. D & J Equip. Rental, Inc., 111 N.C. App. 228, 431 S.E.2d 849, cert. denied, 335 N.C. 172, 436 S.E.2d 374 (1993).

IV. DISBURSEMENT OF PROCEEDS.

Jurisdiction Over Distribution With Court or Commission. — Under this section, the distribution of proceeds received from a tortfeasor between an injured employee and an employer entitled to reimbursement can be decided in some instances by either the Industrial

Commission or the trial court. Buckner v. City of Asheville, 113 N.C. App. 354, 438 S.E.2d 467 (1994).

Limitation on Commission; Authority. — The authority of the Industrial Commission to distribute the proceeds of the employer-employee settlement with the tortfeasor is governed by subsection (f) which does not have the authority to make a distribution pursuant to subsection (j). Buckner v. City of Asheville, 113 N.C. App. 354, 438 S.E.2d 467 (1994).

Findings of Fact Required to Be Made by Commission. — The commission must make findings of fact regarding the benefits provided for the treatment of an injured employee for which an employer is entitled to reimbursement. Buckner v. City of Asheville, 113 N.C. App. 354, 438 S.E.2d 467 (1994).

Recovery by Employer of His Underinsured Motorist Benefits. — The employer's underinsured motorist benefits received in an action against the tortfeasor are subject to a subrogation claim by an employer who has paid workers' compensation benefits to its employee. Buckner v. City of Asheville, 113 N.C. App. 354, 438 S.E.2d 467 (1994).

Workers' Compensation Benefits and Uninsured Motorists Coverage. — Defendant insurance company, insurer of vehicle plaintiff was driving at the time of collision, was not entitled to reduce the limits of its uninsured motorists coverage by any amounts paid to plaintiff by her employer's workers' compensation insurance carrier as workers' compensation benefits; employer's workers' compensation insurance carrier was entitled to a lien against all amounts paid or to be paid to plaintiff by defendant insurer of vehicle. Hieb v. St. Paul Fire & Marine Ins. Co., 112 N.C. App. 502, 435 S.E.2d 826 (1993).

§ 97-11. Employer not relieved of statutory duty.

CASE NOTES

Cited in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

§ 97-12. Use of intoxicant or controlled substance; willful neglect; willful disobedience of statutory duty, safety regulation or rule.

CASE NOTES

II. Illustrative Cases.

II. ILLUSTRATIVE CASES.

Injury Held Result of Intoxication. —

There was competent evidence in the record to support a finding that the deceased was intoxicated where decedent's blood alcohol level of .202, would have rendered her borderline between simple impairment and extreme excitement and confusion. Sidney ex rel. Sidney v. Raleigh Paving & Patching, Inc., 109 N.C. App. 254, 426 S.E.2d 424 (1993).

§ 97-13. Exceptions from provisions of Article.

CASE NOTES

VI. Prisoners.

VI. PRISONERS.

Suspension of Workers' Compensation Benefits During Incarceration. — Imprisonment of a person already receiving worker's compensation disability payments cuts off the employer's duty to make payments during the period of confinement. Parker v. Union Camp Corp., 107 N.C. App. 505, 422 S.E.2d 585 (1992).

§ 97-17. Settlements allowed in accordance with Article.

CASE NOTES

When Approved by the Commission. —

Agreement between worker and employer to pay worker compensation, which is approved by the Industrial Commission, becomes an award of the Commission. Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

Commission May Not Set Aside Duty Executed Agreement. — Absent a showing of fraud, misrepresentation, mutual mistake, or undue influence, the Industrial Commission may not set aside a settlement agreement duly executed by the parties, properly submitted to the Industrial Commission for approval, and approved by the Chairman of the Commission in accordance with this section and § 97-82. The fact that defense counsel had attempted to revoke its consent to the agreement after it was submitted to the Commission was immaterial. Glenn v. McDonald's, 109 N.C. App. 45, 425 S.E.2d 727 (1993).

Settlement Agreement Was Not Set Aside on Mutual Mistake Ground. — The Industrial Commission properly determined that plaintiff, who suffered a back injury and sought to set aside settlement agreement for payment of workers' compensation, was not entitled to have the agreement set aside pursuant to this section on the basis of mutual mistake. Vernon v. Steven L. Mabe Bldrs., 110 N.C. App. 552, 430 S.E.2d 676, cert. granted, 334 N.C. 689, 436 S.E.2d 388 (1993).

Employer's Mistaken Representation Agreement Was a "Proper One." — Where documents, stipulations and findings indisputably showed that the parties and Commission acted upon defendant employer's mistaken representation that the original compensation agreement was a "proper one," and since the mistake benefited its initiator to the detriment of the misinformed, acquiescent plaintiff, fundamental equitable principles required that the mistake not be perpetuated. Cockrell v. Evans Lumber Co., 103 N.C. App. 359, 407 S.E.2d 248 (1991).

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992).

§ 97-18. Prompt payment of compensation required; installments; payment without prejudice; notice to Commission; penalties.

(a) Compensation under this Article shall be paid periodically, promptly and directly to the person entitled thereto unless otherwise specifically provided.

(b) When the employer admits the employee's right to compensation, the first installment of compensation payable by the employer shall become due on the fourteenth day after the employer has written or actual notice of the injury or death, on which date all compensation then due shall be paid. Compensation thereafter shall be paid in installments weekly except where the Commission determines that payment in installments should be made monthly or at some other period. Upon paying the first installment of compensation and upon suspending, reinstating, changing, or modifying such compensation for any cause, the insurer shall immediately notify the Commission, on a form prescribed by the Commission, that compensation has begun, or has been suspended, reinstated, changed, or modified. A copy of each notice shall be provided to the employee. The first notice of payment to the Commission shall contain the date and nature of the injury, the average weekly wages of the employee, the weekly compensation rate, the date the disability resulting from the injury began, and the date compensation commenced.

(c) If the employer denies the employee's right to compensation, the employer shall notify the Commission, on or before the fourteenth day after it has written or actual notice of the injury or death, and advise the employee in writing of its refusal to pay compensation on a form prescribed by the Commission. This notification shall (i) include the name of the employee, the name of the employer, the date of the alleged injury or death, the insurer on the risk, if any, and a detailed statement of the grounds upon which the right to compensation is denied, and (ii) advise the employee of the employee's right to request a hearing pursuant to G.S. 97-83.

(d) In any claim for compensation in which the employer or insurer is uncertain on reasonable grounds whether the claim is compensable or whether it has liability for the claim under this Article, the employer or insurer may initiate compensation payments without prejudice and without admitting liability. The initial payment shall be accompanied by a form prescribed by and filed with the Commission, stating that the payments are being made without prejudice. Payments made pursuant to this subsection may continue until the employer or insurer contests or accepts liability for the claim or 90 days from the date the employer has written or actual notice of the injury or death, whichever occurs first, unless an extension is granted pursuant to this section. Prior to the expiration of the 90-day period, the employer or insurer may upon reasonable grounds apply to the Commission for an extension of not more than 30 days. The initiation of payment does not affect the right of the employer or insurer to continue to investigate or deny the compensability of the claim or its liability therefor during this period. If at any time during the 90-day period or extension thereof, the employer or insurer contests the compensability of the claim or its liability therefor, it may suspend payment of compensation and shall promptly notify the Commission and the employee on a form prescribed by the Commission. The employer or insurer must provide on the prescribed form a detailed statement of its grounds for denying compensability of the claim or its liability therefor. If the employer or insurer does not contest the compensability of the claim or its liability therefor within 90 days from the date it first has written or actual notice of the injury or death, or within such additional period as may be granted by the Commission, it waives the right to contest the compensability of and its liability for the claim under this Article. However, the employer or insurer may contest the compensability of or its liability for the claim after the 90-day period or extension thereof when it can show that material evidence was discovered after that period that could not have been reasonably discovered earlier, in which event the employer or insurer may terminate or suspend compensation subject to the provisions of G.S. 97-18.1.

(e) The first installment of compensation payable under the terms of an award by the Commission, or under the terms of a judgment of the court upon an appeal from such an award, shall become due 10 days from the day following expiration of the time for appeal from the award or judgment or the day after notice waiving the right of appeal by all parties has been received by the Commission, whichever is sooner. Thereafter compensation shall be paid in installments weekly, except where the Commission determines that payment in installments shall be made monthly or in some other manner.

(f) The employer's or insurer's grounds for contesting the employee's claim or its liability therefor as specified in the notice suspending compensation under subsection (d) of this section are the only bases for the employer's or insurer's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered material evidence that could not reasonably have been discovered prior to the notice suspending compensation.

(g) If any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(h) Within 16 days after final payment of compensation has been made, the employer shall send to the Commission and the employee a notice, in accordance with a form prescribed by the Commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the Commission or the employee within such time, the Commission shall assess against such employer a civil penalty in the amount of twenty-five dollars ($25.00).

(i) If any bill for services rendered under G.S. 97-25 by any provider of health care is not paid within 60 days after it has been approved by the Commission and returned to the responsible party, or within 60 days after it was properly submitted, in accordance with the provisions of this Article, to an insurer or managed care organization responsible for direct reimbursement pursuant to G.S. 97-26(g), there shall be added to such unpaid bill an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such medical bill, unless such late payment is excused by the Commission. (1929, c. 120, s. 18½; 1967, c. 1229, s. 2; 1979, c. 249, ss. 1, 2; c. 599; 1993 (Reg. Sess., 1994), c. 679, s. 3.1.)

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.1, "The Workers' Compensation Reform Act of 1994," effective July 5, 1994, and applicable to claims pending on or filed after that date, rewrote the section.

Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.1, "The Workers' Compensation Reform Act of 1994," effective January 1, 1995, and applicable to claims filed on or after that date, inserted "payment without prejudice" in the section catchline.

§ 97-18.1. Termination or suspension of compensation benefits.

(a) Payments of compensation pursuant to an award of the Commission shall continue until the terms of the award have been fully satisfied.

(b) An employer may terminate payment of compensation for total disability being paid pursuant to G.S. 97-29 when the employee has returned to work for the same or a different employer, subject to the provisions of G.S. 97-32.1, or when the employer contests a claim pursuant to G.S. 97-18(d) within the time allowed thereunder. The employer shall promptly notify the Commission and the employee, on a form prescribed by the Commission, of the termination of compensation and the availability of trial return to work and additional compensation due the employee for any partial disability.

(c) An employer seeking to terminate or suspend compensation being paid pursuant to G.S. 97-29 for a reason other than those specified in subsection (b) of this section shall notify the employee and the employee's attorney of record in writing of its intent to do so on a form prescribed by the Commission. A copy of the notice shall be filed with the Commission. This form shall contain the reasons for the proposed termination or suspension of compensation, be supported by available documentation, and inform the employee of the employee's right to contest the termination or suspension by filing an objection in writing with the Commission within 14 days of the date the employer's notice is filed with the Commission or within such additional reasonable time as the Commission may allow.

(d) If the employee fails to object to the employer's notice of proposed termination or suspension within the time provided, the Commission may enter an appropriate order terminating or suspending the compensation if it finds that there is a sufficient basis under this Article for this action. If the employee files a timely objection to the employer's notice, the Commission shall conduct an informal hearing by telephone with the parties or their counsel. If either party objects to conducting the hearing by telephone, the Commission may conduct the hearing in person in Raleigh or at another location selected by the Commission. The parties shall be afforded an opportunity to state their position and to submit documentary evidence at the informal hearing. The employer may waive the right to an informal hearing and proceed to the formal hearing. The informal hearing, whether by telephone or in person, shall be conducted only on the issue of termination or suspension of compensation and shall be conducted within 25 days of the receipt by the Commission of the employer's notice to the employee unless this time is extended by the Commission for good cause. The Commission shall issue a decision on the employer's application for termination of compensation within five days after completion of the informal hearing. The decision shall (i) approve the application, (ii) disapprove the application, or (iii) state that the Commission is unable to reach a decision on the application in an informal hearing, in which event the Commission shall schedule a formal hearing pursuant to G.S. 97-83 on the employer's application for termination of compensation. Compensation may be terminated or suspended by the employer following an informal hearing only if its application is approved. If the Commission was unable to reach a decision in the informal hearing, the employee's compensation shall continue pending a decision by the Commission in the formal hearing. The Commission's decision in the informal hearing is not binding in subsequent hearings.

The employer or the employee may request a formal hearing pursuant to G.S. 97-83 on the Commission's decision approving or denying the employer's application for termination of compensation. A formal hearing under G.S. 97-83 ordered or requested pursuant to this section shall be a hearing de novo on the employer's application for termination or suspension of compensation and may be scheduled by the Commission on a preemptive basis.

(e) At an informal hearing on the issue of termination or suspension of compensation, and at any subsequent hearing, the Commission may address related issues regarding the selection of medical providers or treatment under G.S. 97-25, subject to exhaustion of the dispute resolution procedures of a managed care organization pursuant to G.S. 97-25.2. (1993 (Reg. Sess., 1994), c. 679, ss. 3.6, 10.9.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(a), made this section effective October 1, 1994, and applicable to claims pending on or filed after that date.

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, ss. 3.6, 10.9, "The Workers' Compensation Reform Act of 1994," effective January 1, 1995, and applicable to claims pending on or filed after that date, added "or when the employer contests a claim pursuant to G.S. 97-18(d) within the time allowed thereunder" at the end of the first sentence of subsection (b).

§ 97-19. Liability of principal contractors; certificate that subcontractor has complied with law; right to recover compensation of those who would have been liable; order of liability.

Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by a workers' compensation insurance carrier, or a certificate of compliance issued by the Department of Insurance to aself-insured subcontractor, stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable, irrespective of whether such subcontractor has regularly in service fewer than three employees in the same business within this State, to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of any such subcontractor, any principal or partner of such subcontractor or any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract. If the principal contractor, intermediate contractor or subcontractor shall obtain such certificate at the time of subletting such contract to subcontractor, he shall not thereafter be held liable to any such subcontractor, any principal or partner of such subcontractor, or any employee of such subcontractor for compensation or other benefits under this Article. If the subcontractor has no employees and waives in writing his right to coverage under this section, the principal contractor, intermediate contractor, or subcontractor subletting the contract shall not thereafter be held liable for compensation or other benefits under this Article to said subcontractor. Subcontractors who have no employees are not required to comply with G.S. 97-93.

Any principal contractor, intermediate contractor, or subcontractor paying compensation or other benefits under this Article, under the foregoing provisions of this section, may recover the amount so paid from any person, persons, or corporation who independently of such provision, would have been liable for the payment thereof.

Every claim filed with the Industrial Commission under this section shall be instituted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer.

The principal or owner may insure any or all of his contractors and their employees in a blanket policy, and when so insured such contractor's employees will be entitled to compensation benefits regardless of whether the relationship of employer and employee exists between the principal and the contractor. (1929, c. 120, s. 19; 1941, c. 358, s. 1; 1945, c. 766; 1973, c. 1291, s. 10; 1979, c. 247, s. 2; 1987, c. 729, s. 4; 1989, c. 637; 1991, c. 703, s. 7; 1993 (Reg. Sess., 1994), c. 679, s. 10.6.)

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 10.6, "The Workers' Compensation Reform Act of 1994," effective July 5, 1994, substituted "fewer than three employees" for "less than four employees" in the first sentence of the first paragraph.

CASE NOTES

Editor's Note. *— The annotation to Carroll v. Daniels & Daniels Constr. Co., 96 N.C. App. 649, 386 S.E.2d 752, cert. granted, 326 N.C. 594, 393 S.E.2d 874 (1990), which appears under this section in the main volume beneath the catchline:* ***"Defendant-Carrier Estopped from Denying Coverage",*** *should be disregarded. The North Carolina Supreme Court reversed this decision in Carroll v. Daniels & Daniels Constr. Co., 327 N.C. 616, 398 S.E.2d 325 (1990). The latter decision is also annotated under section in the main volume beneath the catchlines:* ***"In order to extend workers' compensation insurance contract,"*** *etc., and* ***"Evidence Insufficient to Support Estoppel of Carrier."***

This section protects the employees of a subcontractor, etc. — When a principal contractor sublets part of the contract to an independent contractor, that independent contractor's employees are protected by this section if the independent contractor is uninsured. Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

But subcontractor is not entitled to immunity from civil suit merely because principal contractor secured workers' compensation insurance coverage for subcontractor's employees. Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

Quoted in Postell v. B & D Constr. Co., 104 N.C. App. 1, 411 S.E.2d 413 (1992).

Cited in Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992).

§ 97-21. (Effective October 1, 1994 — See editor's note) Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation void; unlawful deduction by employer.

No claim for compensation under this Article shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors and from taxes.

No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this Article shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this Article shall be guilty of a Class 3 misdemeanor and upon conviction thereof shall be punished only by a fine of not more than five hundred dollars ($500.00). No agreement by an employee to waive his right to compensation under this Chapter shall be valid. (1929, c. 120, s. 21; 1993, c. 539, s. 677; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 3" preceding "misdemeanor" and inserted "only" following "shall be punished" in the second paragraph.

§ 97-22. Notice of accident to employer.

CASE NOTES

Commission's Findings Conclusive, etc. —

Whether a plaintiff was injured by accident and had a reasonable excuse for not giving the employer timely notice were factual issues that depended entirely upon her credibility. Since the Commission found, as its prerogative as fact finder permitted, that plaintiff's testimony was not credible, that determination was binding upon the Court of Appeals. Elliot v. A.O. Smith Corp., 103 N.C. App. 523, 405 S.E.2d 799 (1991).

§ 97-24. Right to compensation barred after two years; destruction of records.

(a) The right to compensation under this Article shall be forever barred unless (i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article. The provisions of this subsection shall not limit the time otherwise allowed for the filing of a claim for compensation for occupational disease in G.S. 97-58, but in no event shall the time for filing a claim for compensation for occupational disease be less than the times provided herein for filing a claim for an injury by accident.

(b) If any claim for compensation is hereafter made upon the theory that such claim or the injury upon which said claim is based is within the jurisdiction of the Industrial Commission under the provisions of this Article, and if the Commission, or the appellate courts on appeal, shall adjudge that such claim is not within the Article, the claimant, or if he dies, his personal representative, shall have one year after the rendition of a final judgment in the case within which to commence an action at law.

(c) When all claims and reports required by this Article have been filed, and the cases and records of which they are a part have been closed by proper reports, receipts, awards or orders, these records, may after five years in the discretion of the Commission, with and by the authorization and approval of the Department of Cultural Resources, be destroyed by burning or otherwise. (1929, c. 120, s. 24; 1933, c. 449, s. 2; 1945, c. 766; 1955, c. 1026, s. 12; 1973, c. 476, s. 48; c. 1060, s. 1; 1991, c. 703, s. 8; 1993 (Reg. Sess., 1994), c. 679, s. 3.4.)

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.4, "The Workers' Compensation Reform Act of 1994," effective January 1, 1995, and applicable to claims pending on or filed after that date, rewrote subsection (a).

CASE NOTES

Jurisdiction — Determination of Widow's Rights. — Even if decedent's widow did not technically file a claim for decedent's death benefits, the Industrial Commission had jurisdiction to determine her rights to receive death benefits if the Commission otherwise had jurisdiction to hear the claim. Murray v. Associated Insurers, Inc., 114 N.C. App. 506, 442 S.E.2d 370 (1994).

§ 97-25. Medical treatment and supplies.

Legal Periodicals. — For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

CASE NOTES

I. In General.
II. What Treatment Must Be Provided.

I. IN GENERAL.

No "Change of Condition" Requirement. — Nothing in the language of this section implies that the "change of condition" requirement of § 97-47 applies to any request by an employee for the payment of his medical expenses by his employer. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

The complete absence of an express or implied reference in this section to any "change of condition" requirement, in addition to this section's clear language permitting the Industrial Commission to review medical treatment an employee is receiving and order further treatment at any time if an employee requests such a review, indicated that the legislature did not intend for an injured employee to make any showing of a change in condition before his employer would be required to pay for further medical services or treatment needed as a result of his compensable injury. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

Construction with § 97-47. — Because "compensation" does not include the payment of medical expenses, the provisions of § 97-47 do not affect the Commission's grant or denial of an employee's request for payments of those expenses. The Commission's authority for requiring an employer to pay the medical expenses of an injured employee is established by the terms of this section. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

Applied in Braswell v. Pitt County Mem. Hosp., 106 N.C. App. 1, 415 S.E.2d 86 (1992).

Cited in Bowden v. Boling Co., 110 N.C. App. 226, 429 S.E.2d 394 (1993).

II. WHAT TREATMENT MUST BE PROVIDED.

Relief from pain is a legitimate aspect of the "relief" anticipated by future medical treatment under this section. Simon v. Triangle Materials, Inc., 106 N.C. App. 39, 415 S.E.2d 105, cert. denied, 332 N.C. 347, 421 S.E.2d 154 (1992).

Relief from pain constituted "relief" as that term was used in this section prior to 1991 amendment. Radica v. Carolina Mills, 113 N.C. App. 440, 439 S.E.2d 185 (1994).

Future Medical Expenses for Procedure to Relieve Pain. — Defendants were required to pay for plaintiff's back surgery and related medical expenses as long as the surgery would give plaintiff relief, regardless of whether such surgery would lessen the period of disability or effect a cure for his injury, where, plaintiff contended the surgery would relieve a substantial portion of the pain he was suffering. Simon v. Triangle Materials, Inc., 106 N.C. App. 39, 415 S.E.2d 105, cert. denied, 332 N.C. 347, 421 S.E.2d 154 (1992).

§ 97-25.1. Limitation of duration of medical compensation.

The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation. If the Commission determines that there is a substantial risk of the necessity of future medical compensation, the Commission shall provide by order for payment of future necessary medical compensation. (1993 (Reg. Sess., 1994), c. 679, s. 2.5.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994) c. 679, s. 11.1(g), made this section effective upon ratification, and applicable to injuries by accident occurring on or after that date. The act was ratified July 5, 1994.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-25.2. Managed care organizations.

The requirements of G.S. 97-25 may be satisfied by contracting with a managed care organization. Notwithstanding any other provision of this Article, if an employer or carrier contracts with a managed care organization for medical services pursuant to this Article, those employees who are covered by the contract with the managed care organization shall receive medical services for a condition for which the employer has accepted liability or authorized treatment under this Article in the manner prescribed by the contract and in accordance with the managed care organization's certificate of authority; provided that the contract complies with rules adopted by the Commission, consistent with this Article, governing managed care organizations. An employee must exhaust all dispute resolution procedures of a managed care organization before applying to the Commission for review of any issue related to medical services compensable under this Article. Once application to the Commission has been made, the employee shall be entitled to an examination by a duly qualified physician or surgeon in the same manner as provided by G.S. 97-27.

If an employee's medical services are provided through a managed care organization pursuant to this section, subject to the rules of the managed care organization, the employee shall select the attending physician from those physicians who are members of the managed care organization's panel, and may subsequently change attending physicians once within the group of physicians who are members of the managed care organization's panel without approval from the employer or insurer. Additional changes in the attending physician or any change to a physician or examination by a physician not a member of the insurer's managed care organization's panel shall only be made pursuant to the organization's contract or upon reasonable grounds by order of the Commission. (1993 (Reg. Sess., 1994), c. 679, s. 2.1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(d), made this section effective September 1, 1994, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-25.3. Preauthorization.

(a) An insurer may require preauthorization for inpatient admission to a hospital, inpatient admission to a treatment center, and inpatient or outpatient surgery. The insurer's preauthorization requirement must adhere to the following standards:

(1) The insurer may require no more than 10 days advance notice of the inpatient admission or surgery.

(2) The insurer must respond to a request for preauthorization within two business days of the request.

(3) The insurer shall review the need for the inpatient admission or surgery and may require the employee to submit to an independent medical examination as provided in G.S. 97-27(a). This examination must be completed and the insurer must make its determination on the request for preauthorization within seven days of the date of the request unless this time is extended by the Commission for good cause.

(4) The insurer shall document its review findings and determination in writing and shall provide a copy of the findings and determination to the employee and the employee's attending physician, and, if applicable, to the hospital or treatment center.

(5) The insurer shall authorize the inpatient admission or surgery when it requires the employee to submit to a medical examination as provided in G.S. 97-27(a) and the examining physician concurs with the original recommendation for the inpatient admission or surgery. The insurer shall also authorize the inpatient admission or surgery when the employee obtains a second opinion from a physician approved by the insurer or the Commission, and the second physician concurs with the original recommendation for the inpatient admission or surgery. However, the insurer shall not be required by this subdivision to authorize the inpatient admission or surgery if it denies liability under this Article for the particular medical condition for which the services are sought.

(6) Except as provided in subsection (c) of this section, the insurer may reduce its reimbursement of the provider's eligible charges under this Article by up to fifty percent (50%) if the insurer has notified the provider in writing of its preauthorization requirement and the provider failed to timely obtain preauthorization. The employee shall not be liable for the balance of the charges.

(7) The insurer shall adhere to all other procedures for preauthorization prescribed by the Commission.

(b) An insurer may not impose a preauthorization requirement for the following:

(1) Emergency services;

(2) Services rendered in the diagnosis or treatment of an injury or illness for which the insurer has not admitted liability or authorized payment for treatment pursuant to this Article; and

(3) Services rendered in the diagnosis and treatment of a specific medical condition for which the insurer has not admitted liability or authorized payment for treatment although

the insurer admits the employee has suffered a compensable injury or illness.

(c) The Commission may, upon reasonable grounds, upon the request of the employee or provider, authorize treatment for which preauthorization is otherwise required by this section but was not obtained if the Commission determines that the treatment is or was reasonably required to effect a cure or give relief.

(d) The Commission may adopt procedures governing the use of preauthorization requirements and expeditious review of preauthorization denials.

(e) A managed care organization may impose preauthorization requirements consistent with the provisions of Chapter 58 of the General Statutes.

(f) A provider that refuses to treat an employee for other than an emergency medical condition because preauthorization has not been obtained shall be immune from liability in any civil action for the refusal to treat the employee because of lack of preauthorization. (1993 (Reg. Sess., 1994), c. 679, s. 2.2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(d), made this section effective September 1, 1994, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-25.4. Utilization guidelines for medical treatment.

(a) The Commission may adopt utilization rules and guidelines, consistent with this Article, for medical care and medical rehabilitation services, other than those services provided by managed care organizations pursuant to G.S. 97-25.2, including, but not limited to, necessary palliative care, physical therapy treatment, psychological therapy, chiropractic services, medical rehabilitation services, and attendant care. The Commission's rules and guidelines shall ensure that injured employees are provided the services and care intended by this Article and that medical costs are adequately contained. In developing the rules and guidelines, the Commission may consider, among other factors, the practice guidelines adopted by the boards and associations representing medical and rehabilitation professionals.

(b) Palliative care rules or guidelines adopted by the Commission may require that the provider (i) supply to the employer a treatment plan, including a schedule of measurable objectives, a projected termination date for treatment, and an estimated cost of services, and (ii) obtain preauthorization from the employer, not inconsistent with the provisions of G.S. 97-25.3. (1993 (Reg. Sess., 1994), c. 679, s. 2.4.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(d), made this section effective September 1, 1994, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-25.5. Utilization guidelines for vocational and other rehabilitation.

The Commission may adopt utilization rules and guidelines, consistent with this Article, for vocational rehabilitation services and other types of rehabilitation services. In developing the rules and guidelines, the Commission may consider, among other factors, the practice and treatment guidelines adopted by professional rehabilitation associations and organizations. (1993 (Reg. Sess., 1994), c. 679, s. 2.4.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(d), made this section effective September 1, 1994, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-26. Fees allowed for medical treatment; malpractice of physician.

(a) Fee Schedule. — The Commission shall adopt a schedule of maximum fees for medical compensation, except as provided in subsection (b) of this section, and shall periodically review the schedule and make revisions pursuant to the provisions of this Article.

The fees adopted by the Commission in its schedule shall be adequate to ensure that (i) injured workers are provided the standard of services and care intended by this Chapter, (ii) providers are reimbursed reasonable fees for providing these services, and (iii) medical costs are adequately contained.

Prior to adoption of a fee schedule, the Commission shall publish notice of its intent to adopt the schedule in the North Carolina Register and hold a public hearing. The published notice shall include the location, date and time of the public hearing, the proposed effective date of the fee schedule, the period of time during which the Commission will receive written comments on the proposed schedule, and the person to whom comments and questions should be directed. In addition to publication in the North Carolina Register, the notice may be mailed to parties who have requested notice of the fee schedule hearing. The public hearing shall be held no earlier than 15 days after the publication of the notice. The Commission shall receive written comments for at least 30 days or until the date of the public hearing, whichever is later, after which the Commission may adopt the fee schedule.

The Commission may consider any and all reimbursement systems and plans in establishing its fee schedule, including, but not limited to, the Teachers' and State Employees' Comprehensive Major Medical Plan (hereinafter, "State Plan"), Blue Cross and Blue Shield, and any other private or governmental plans. The Commission may also consider any and all reimbursement methodologies, including, but not limited to, the use of current procedural terminology ("CPT") codes, diagnostic-related groupings ("DRGs"), per diem rates, capitated payments, and resource-based relative-value system ("RBRVS") payments. The Commission may consider statewide fee averages, geographical and community variations in provider costs, and any other factors affecting provider costs.

An appeal from a decision of the Commission establishing a fee schedule, by any party aggrieved thereby, shall be to the North Carolina Court of Appeals. The decision of the Commission shall be affirmed if supported by substantial evidence. For the purposes of the appeal, the Commission is a party.

(b) Hospital Fees. — Payment for medical compensation rendered by a hospital participating in the State Plan shall be equal to the payment the hospital receives for the same treatment and services under the State Plan. Payment for a particular type of medical compensation that is not covered under the State Plan shall be based on the allowable charge under the State Plan for comparable services or treatment, as determined by the Commission. Each hospital subject to the provisions of this subsection shall be reimbursed the amount provided for in this subsection unless it has agreed under contract with the insurer or managed care organization to accept a different amount or reimbursement methodology.

(c) Maximum Reimbursement for Providers Under Subsection (a). — Each health care provider subject to the provisions of subsection (a) of this section shall be reimbursed the amount specified under the fee schedule unless the provider has agreed under contract with the insurer or managed care organization to accept a different amount or reimbursement methodology. In any instance in which neither the fee schedule nor a contractual fee applies, the maximum reimbursement to which a provider under subsection (a) is entitled under this Article is the usual, customary, and reasonable charge for the service or treatment rendered. In no event shall a provider under subsection (a) charge more than its usual fee for the service or treatment rendered.

(d) Information to Commission. — Each health care provider seeking reimbursement for medical compensation under this Article shall provide the Commission information requested by the Commission for the development of fee schedules and the determination of appropriate reimbursement.

(e) When Charges Submitted. — Health care providers shall submit charges to the insurer or managed care organization within 30 days of treatment, within 30 days after the end of the month during which multiple treatments were provided, or within such other reasonable period of time as allowed by the Commission. If an insurer or managed care organization disputes a portion of a health care provider's bill, it shall pay the uncontested portion of the bill and shall resolve disputes regarding the balance of the charges in accordance with this Article or its contractual arrangement.

(f) Repeating Diagnostic Tests. — A health care provider shall not authorize a diagnostic test previously conducted by another provider, unless the health care provider has reasonable grounds to believe a change in patient condition may have occurred or the quality of the prior test is doubted. The Commission may adopt rules establishing reasonable requirements for reports and records to be made available to other health care providers to prevent unnecessary duplication of tests and examinations. A health care provider that violates this subsection shall not be reimbursed for the costs associated with administering or analyzing the test.

(g) Direct Reimbursement. — The Commission may adopt rules to allow insurers and managed care organizations to review and reimburse charges for medical compensation without submitting the charges to the Commission for review and approval.

(h) Malpractice. — The employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of this section, but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident, and shall be compensated for as such. (1929, c. 120, s. 26; 1955, c. 1026, s. 3; 1993 (Reg. Sess., 1994), c. 679, s. 2.3.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, which amended this section, in s. 11.1 provides in part: "This act is effective upon ratification, except as follows:

"(b) G.S. 97-26(b) and G.S. 97-26(f), as enacted in Section 2.3, become effective October 1, 1994. G.S. 97-26(a), as enacted in Section 2.3, is effective upon ratification [July 5, 1994] but the provisions of the third paragraph of said subsection shall not apply to the fee schedule in effect as of the date of ratification of this act [July 5, 1994]."

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 2.3, "The Workers' Compensation Reform Act of 1994," substituted "Fees allowed for medical treatment" for "Liability for medical treatment measured by average cost in community" in the catchline of the section, and rewrote this section. For effective date and applicability, see editor's note.

§ 97-26.1. Fees for medical records and reports; expert witnesses.

The Commission may establish maximum fees for the following when related to a claim under this Article: (i) the searching, handling, copying, and mailing of medical records, (ii) the preparation of medical reports and narratives, and (iii) the presentation of expert testimony in a Commission proceeding. (1993 (Reg. Sess., 1994), c. 679, s. 5.6.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1, made this section effective upon ratification. The act was ratified July 5, 1994.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.

CASE NOTES

Refusal to Undergo Diagnostic Tests. —

The Workers' Compensation Statute does not compel the employer, nor the Industrial Commission, to rely upon one source of medical information, that provided by the injured plaintiff. The statute specifically suspends an injured employee's right to compensation should he or she refuse to submit to examination by a physician designated and paid for by the employer. Blankley v. White Swan Uniform Rentals, 107 N.C. App. 751, 421 S.E.2d 603 (1992), cert. denied, 333 N.C. 461, 427 S.E.2d 618 (1993).

Cited in Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992); Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

§ 97-29. Compensation rates for total incapacity.

CASE NOTES

I. In General.
II. Permanent and Total Disability.

I. IN GENERAL.

Construction with § 97-31. — Once an employee recovers permanent disability benefits pursuant to § 97-31, the employee is precluded from seeking permanent benefits for the same injury pursuant to this section, absent a change in his condition. Vernon v. Steven L. Mabe Bldrs., 110 N.C. App. 552, 430 S.E.2d 676, cert. denied, 334 N.C. 689, 436 S.E.2d 388 (1993).

Inability to Obtain Future Employment. — Where an employee's effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist. Lackey v. R.L. Stowe Mills, Inc., 106 N.C. App. 658, 418 S.E.2d 517, cert. denied, 332 N.C. 345, 421 S.E.2d 150 (1992).

In order to prove .disability the burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury. Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 425 S.E.2d 454 (1993).

Burden of Proof. — A claimant who asserts that he is entitled to compensation under this section has the burden of proving that he is, as a result of the injury arising out of and in the course of his employment, totally unable to earn wages which in the same or any other employment. Burwell v. Winn-Dixie Raleigh, Inc., 114 N.C. App. 69, 441 S.E.2d 145 (1994).

Applied in Gilliam v. Perdue Farms, 112 N.C. App. 535, 435 S.E.2d 780 (1993).

Stated in Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 414 S.E.2d 102 (1992).

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); Bowden v. Boling Co., 110 N.C. App. 226, 429 S.E.2d 394 (1993); Conklin v. Carolina Narrow Fabrics Co., 113 N.C. App. 542, 439 S.E.2d 239 (1994).

II. PERMANENT AND TOTAL DISABILITY.

When Apportionment Not Permitted. — Apportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's nondisabling, preexisting disease or infirmity. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

An employee is also entitled to full compensation for total disability without apportionment when the nature of the employee's total disability makes any attempt at apportionment between work-related and non-work-related causes speculative. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

§ 97-30. Partial incapacity.

CASE NOTES

Section 97-31 Compared. — An employee who suffers injuries resulting in partial disability of a general nature is entitled to compensation under this section, while an employee who sustains injuries of a specific nature is entitled to recover pursuant to the schedule provided in § 97-31. In fact, an employee who sustains both general and specific injuries may recover benefits under both this section and § 97-31. Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 414 S.E.2d 102 (1992).

Employer's failure to tell employee about benefits provided under this section was not sufficient reason to set aside the award where employee-plaintiff entered into an agreement, accepted all the benefits from it, and chose not to contest it until almost two years after entering the agreement. Crump v. Independence Nissan, 112 N.C. App. 587, 436 S.E.2d 589 (1993).

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992).

§ 97-31. Schedule of injuries; rate and period of compensation.

CASE NOTES

I. In General.
VII. Disfigurement.

I. IN GENERAL.

Section Construed with § 97-29. — Once an employee recovers permanent disability benefits pursuant to this section, the employee is precluded from seeking permanent benefits for the same injury pursuant to § 97-29, absent a change in his condition. Vernon v. Steven L. Mabe Bldrs., 110 N.C. App. 552, 430 S.E.2d 676, cert. granted, 334 N.C. 689, 436 S.E.2d 388 (1993).

Section Construed with § 97-30. — An employee who suffers injuries resulting in partial disability of a general nature is entitled to compensation under § 97-30, while an employee who sustains injuries of a specific nature is entitled to recover pursuant to the schedule provided in this section. In fact, an employee who sustains both general and specific injuries may recover benefits under both § 97-30 and this section. Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 414 S.E.2d 102 (1992).

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992).

VII. DISFIGUREMENT.

Separate Awards to Be Entered in Cases Involving Facial and Bodily Disfigurement. — Under this section prior to amendment in 1987, in cases where there was both facial and bodily disfigurement, where Commission did not specify in its opinion separate award amounts for each category of disfigurement, but made one award to compensate the injured worker for both types of disfigurement, would be upheld. However, in view of the 1987 amendment, in future cases, separate awards should be entered in cases involving both types of disfigurement. Crews v. North Carolina DOT, 103 N.C. App. 372, 405 S.E.2d 595 (1991).

§ 97-31.1. Effective date of legislative changes in benefits.

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 10.1, "The Workers' Compensation Reform Act of 1994," provides: "G.S. 97-31.1 does not apply to this act [c. 679, which amended the Workers' Compensation Act.]"

§ 97-32. Refusal of injured employee to accept suitable employment as suspending compensation.

CASE NOTES

Cited in Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

§ 97-32.1. Trial return to work.

Notwithstanding the provisions of G.S. 97-32, an employee may attempt a trial return to work for a period not to exceed nine months. During a trial return to work period, the employee shall be paid any compensation which may be owed for partial disability pursuant to G.S. 97-30. If the trial return to work is unsuccessful, the employee's right to continuing compensation under G.S. 97-29 shall be unimpaired unless terminated or suspended thereafter pursuant to the provisions of this Article. (1993 (Reg. Sess., 1994), c. 679, s. 4.1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(a) made this section effective October 1, 1994, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-33. Prorating in event of earlier disability or injury.

CASE NOTES

When Apportionment Not Permitted. — Apportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's nondisabling, preexisting disease or infirmity. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

An employee is also entitled to full compensation for total disability without apportionment when the nature of the employee's total disability makes any attempt at apportionment between work-related and non-work-related causes speculative. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

§ 97-35. How compensation paid for two injuries; employer liable only for subsequent injury.

CASE NOTES

When Apportionment Not Permitted. — Apportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's nondisabling, preexisting disease or infirmity. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

An employee is also entitled to full compensation for total disability without apportionment when the nature of the employee's total disability makes any attempt at apportionment between work-related and non-work-related causes speculative. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

Stated in Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 414 S.E.2d 102 (1992).

§ 97-38. Where death results proximately from compensable injury or occupational disease; dependents; burial expenses; compensation to aliens; election by partial dependents.

CASE NOTES

I. In General.

I. IN GENERAL.

Pneumonia Arising from Accidental Injuries. — Where both medical experts who testified at hearing testified that in their expert opinions, decedent's pneumonia and resulting death were caused by by complications arising from the injuries decedent sustained in accident, there was sufficient competent evidence to support the Commission's finding of causation. Murray v. Associated Insurers, Inc., 114 N.C. App. 506, 442 S.E.2d 370 (1994).

Applied in Cockrell v. Evans Lumber Co., 103 N.C. App. 359, 407 S.E.2d 248 (1991).

§ 97-39. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent.

CASE NOTES

Presumption of Dependency. — By statute, a widow is conclusively presumed to be wholly dependent for support upon the deceased employee, and shall receive benefits under the Workers' Compensation Act. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

Spouse's Adultery Does Not Create an Exception to Statutes. — It is not within the authority of courts to create an exception to § 97-2(14) and this section based upon adultery by a spouse. To find that the legislature intended such an exception, it must be apparent in the statute. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

A wife's adulterous affair did not bar her from qualifying as her husband's widow under § 97-2(14) or this section. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

§ 97-40.1. Second Injury Fund.

(a) There is hereby created a fund to be known as the "Second Injury Fund," to be held and disbursed by the Industrial Commission as hereinafter provided.

For the purpose of providing money for said fund the Industrial Commission may assess against the employer or its insurance carrier the payment of not to exceed two hundred fifty dollars ($250.00) for the loss, or loss of use, of each minor member in every case of a permanent partial disability where there is such loss, and shall assess not to exceed seven hundred fifty dollars ($750.00) for fifty percent (50%) or more loss or loss of use of each major member, defined as back, foot, leg, hand, arm, eye, or hearing.

(b) The Industrial Commission shall disburse moneys from the Second Injury Fund in unusual cases of second injuries as follows:

(1) To pay additional compensation in cases of second injuries referred to in G.S. 97-33; provided, however, that the original injury and the subsequent injury were each at least twenty percent (20%) of the entire member; and, provided further, that such additional compensation, when added to the compensation awarded under said section, shall not exceed the amount which would have been payable for both injuries had both been sustained in the subsequent accident.

(2) To pay additional compensation to an injured employee who has sustained permanent total disability in the manner referred to in the second paragraph of G.S. 97-35, which shall be in addition to the compensation awarded under said section; provided, however, that such additional compensation, when added to the compensation awarded under said section, shall not exceed the compensation for permanent total disability as provided for in G.S. 97-29.

(3) To pay compensation and medical expense in cases of permanent and total disability resulting from an injury to the brain or spinal cord in the manner and to the extent hereinafter provided.

The additional compensation and treatment expenses herein provided for shall be paid out of the Second Injury Fund exclusively and only to the extent to which the assets of such fund shall permit.

(c) In addition to payments for the purposes hereinabove set forth, the Industrial Commission may, in its discretion, make payments from said fund for the following purposes and under the following conditions:

(1) In any case in which total and permanent disability due to paralysis or loss of mental capacity has resulted from an injury to the brain or spinal cord, the Industrial Commission may, in its discretion enter an award and pay compensation and reasonable and necessary medical, nursing, hospital, institutional, equipment, and other treatment ex-

penses from the Second Injury Fund during the life of the injured employee in cases where the injury giving rise to such disability occurred prior to July 1, 1953, and the last payment of compensation has been made subsequent to January 1, 1941. Such compensation and medical expense shall be paid only from April 4, 1947, and after the employer's liability for compensation and treatment expense has ended, and in every case in which the injury resulting in paralysis due to injury to the spinal cord occurred subsequent to April 4, 1947, and prior to July 1, 1953, the liability of the employer and his insurance carrier to pay compensation and medical expense during the life of the injured employee shall not be affected by this section.

(2) When compensation is allowed from the fund in any case under subdivision (1) of subsection (c), the Commission may in its discretion authorize payment of medical, nursing, hospital, equipment, and other treatment expenses incurred prior to the date compensation is allowed and after the employer's liability has ended if funds are reasonably available in the Second Injury Fund for such purpose after paying claims in cases of second injuries as specified in G.S. 97-33 and 97-35. Should the fund be insufficient to pay both compensation and treatment expenses, then the said expenses may, in the discretion of the Commission, be paid first and compensation thereafter according to the reasonable availability of funds in the fund. (1953, c. 1135, s. 2; 1957, c. 1396, s. 4; 1963, c. 450, s. 3; 1977, c. 457; 1991, c. 703, s. 11; 1993 (Reg. Sess., 1994), c. 679, s. 6.1.)

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 6.1, "The Workers' Compensation Reform Act of 1994," effective July 1, 1994, changed the dollar amounts in the second paragraph of subsection (a) from $100.00 and $500.00 to $250.00 and $750.00, respectively, and deleted the former third paragraph of subsection (a), which required the deposit of funds received for the Second Injury Fund.

§ 97-42. Deduction of payments.

Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment. Unless otherwise provided by the plan, when payments are made to an injured employee pursuant to an employer-funded salary continuation, disability or other income replacement plan, the deduction shall be calculated from payments made by the employer in each week during which compensation was due and payable, without any carry-forward or carry-back of credit for amounts paid in excess of the compensation rate in any given week. (1929, c. 120, s. 42; 1993 (Reg. Sess., 1994), c. 679, s. 3.7.)

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.7, "The Workers' Compensation Reform Act of 1994," effective September 1, 1994, and applicable to claims pending on or filed after that date, substituted "Payments" for "Any payments" at the beginning of the first sentence, deleted "Industrial" preceding "Commission" in that sentence, and added the last sentence.

CASE NOTES

Less Than 100% Credit Was Within Commission's Authority. — Where the Commission's award allowed the defendant credit for payments that they had already made through their private insurer less the plaintiff's reasonable attorney's fees calculated and based upon the amount of the entire worker's compensation award, the award was authorized by the statute since all credit given by the Commission in these circumstances is "subject to the approval" of the Industrial Commission. Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

Employer Should Not Be Denied Full Credit for Payments under Private Benefit Plan. —

In order for an employer to receive full credit for voluntary payments made to an injured employee, this section must be interpreted to mean that the amount of the deduction to which an employer, subject to the approval of the Commission, is entitled is the amount of the gross before-tax payments. Evans v. AT & T Technologies, Inc., 331 N.C. 78, 418 S.E.2d 503 (1992).

The ordinary meaning of the language of this section allows an employer, subject to Commission approval, to receive a full dollar-for-dollar credit for all such payments. Evans v. AT & T Technologies, Inc., 331 N.C. 78, 418 S.E.2d 503 (1992).

§ 97-44. Lump sums.

CASE NOTES

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992).

§ 97-47. Change of condition; modification of award.

Legal Periodicals. —

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

CASE NOTES

I. In General.
II. Change of Condition.

I. IN GENERAL.

Section Not Applicable to Claims for Medical Expenses. — This section does not apply to an employee's right to claim medical payments under the Workers' Compensation Act. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

Nothing in the language of § 97-25 implies that the "change of condition" requirement of this section applies to any request by an employee for the payment of his medical expenses by his employer. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

The proper procedure to end, diminish or increase a compensation award, etc. —

Where the Industrial Commission established an administrative procedure which allowed and condoned the termination of compensation by an employer and the employer's insurance carrier by the mere filing of an Industrial Commission created form (Form 24) notifying the Commission and the employee that compensation was being terminated, the Commission exceeded its authority. Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

Applied in Viergegge v. North Carolina State Univ., 105 N.C. App. 633, 414 S.E.2d 771 (1992).

II. CHANGE OF CONDITION.

No "Change of Condition" Requirement for Claims for Medical Expenses. — The complete absence of an express or implied reference in § 97-25 to any "change of condition" requirement, in addition to that statute's clear language permitting the Industrial Commission to review medical treatment an employee is receiving and order further treatment at any time if an employee requests such a review, indicated that the legislature did not intend for an injured employee to make any showing of a change in condition before his employer would be required to pay for further medical services or treatment needed as a result of his compensable injury. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

Compensation Does Not Include Medical Expenses. — Because "compensation" does not include the payment of medical expenses, this provision does not affect the Commission's grant or denial of an employee's request for payments of those expenses. The Commission's authority for requiring an employer to pay the medical expenses of an injured employee is established by the terms of § 97-25. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

Difference of Opinion. — Plaintiff did not experience a change of condition where one physician gave him a 15% disability rating, which he accepted, and a second physician gave him a 30% disability rating, where the second physician commented that the discrepancy was a difference of opinion. Crump v. Independence Nissan, 112 N.C. App. 587, 436 S.E.2d 589 (1993).

§ 97-47.1. Payment without prejudice; limitations period.

When the employer has paid compensation without prejudice but timely contested liability as provided in G.S. 97-18(d), the right, if any, to further indemnity compensation and medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation, whichever last occurs, unless the employee files with the Commission a claim for further compensation prior to the expiration of this period. (1993 (Reg. Sess., 1994), c. 679, s. 3.5.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(f), made this section effective January 1, 1995, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

Subsection (d) of G.S. 97-18, referred to above, was redesignated as subsection (f).

§ 97-52. Occupational disease made compensable; "accident" defined.

CASE NOTES

Cited in Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

§ 97-53. Occupational diseases enumerated; when due to exposure to chemicals.

CASE NOTES

I. In General.
II. Subdivision (13).

I. IN GENERAL.

Appellate Review Limited. — Review of Industrial Commission decisions is limited to a determination of whether there was competent evidence before the Commission to support its findings and whether such findings support its legal conclusions; the Court of Appeals cannot substitute its judgment for that of the Commission. Findings of fact, when supported by competent evidence, are conclusive on appeal. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Cited in Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

II. SUBDIVISION (13).

What Plaintiff Must Show Under Subdivision (13). —

The Supreme Court has rejected the requirement that an employee quantify the degree of exposure to the harmful agent during his employment. Any evaluation of the workplace for the agent in question after claimant's departure would not quantify claimant's exposure, but would merely "guessimate" it. Since the degree of exposure does not need to be measured during claimant's employment, it should not need to be quantified in findings of fact, either. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

The substance to which plaintiff was last injuriously exposed need not be in a substance known to cause the disease. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Causal Connection May Be Established, etc. —

Circumstantial evidence of the causal connection between the occupation and the disease is sufficient. Medical opinions given may be based either on personal knowledge or observation or on information supplied him by others, including the patient. Absolute medical certainty is not required. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Commission Was Not Required to Make Two Separate Findings Regarding Aggravation of Disease. — The terms "significantly contributing to" and "aggravated," regarding exposure to a substance and its effect on a claimant's health, are interchangeable. Therefore, where the Industrial Commission had determined that plaintiff's exposure to cotton dust did not significantly contribute to his disease, it was tantamount to a finding that his disease was not aggravated by his exposure to cotton dust. It was not necessary for the Commission to make two separate findings. Wilkins v. J.P. Stevens & Co., 100 N.C. App. 742, 398 S.E.2d 66 (1990), aff'd, 333 N.C. 449, 426 S.E.2d 675 (1993).

Factors in Determining Significance of Exposure. —

In accord with the main volume. See Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Explicit Findings Required. —

In accord with the main volume. See Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Claimant Has Burden of Proof. —

Claimant has the burden of proof, but if the occupational exposure in question is such that it augments the disease process to any degree, however slight, the employer is liable. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Respiratory surfaces of the lungs are "external contact surfaces" of the body, etc. —

Evidence offered was sufficient to support the Industrial Commission's findings that a spontaneous tear of the rotator cuff was an occupational disease within the meaning of subsection (13) of this section. Gibbs v. Leggett & Platt, Inc., 112 N.C. App. 103, 434 S.E.2d 653 (1993).

§ 97-57. Employer liable.

CASE NOTES

Presumption Created by Section 97-57. — Section 97-57 creates an irrebuttable legal presumption that the last thirty days of work is the period of last injurious exposure. Thus, "an exposure which proximately augmented the disease to any extent, however slight" is deemed the last injurious exposure. Barber v. Babcock & Wilcox Constr. Co., 101 N.C. App. 564, 400 S.E.2d 735 (1991).

Plaintiff does not have to establish that the conditions of his employment with the defendant caused or significantly contributed to his disease. He need only show that: (1) he has an occupational disease and (2) he was "last injuriously exposed to the hazards of such disease" in the defendant's employment. Barber v. Babcock & Wilcox Constr. Co., 101 N.C. App. 564, 400 S.E.2d 735 (1991).

Plaintiff satisfied his burden of proof and was entitled to workers' compensation benefits where there was an irrebuttable legal presumption that the last thirty days of work subjecting the plaintiff to the hazards of asbestos is the period of last injurious exposure and the Industrial Commission held that plaintiff was exposed to the inhalation during the 48 days he worked for last employer, the defendant. Barber v. Babcock & Wilcox Constr. Co., 101 N.C. App. 564, 400 S.E.2d 735 (1991).

§ 97-58. Time limit for filing claims.

CASE NOTES

IV. Filing of Claims.

IV. FILING OF CLAIMS.

When Two-Year Limit Begins to Run. —

Two conditions must be met in order to start the two-year statute of limitations running against a claimant: (1) The employee must have suffered an occupational disease which renders the employee incapable of earning, at any job, the wages the employee was receiving at the time of the incapacity, and (2) the employee has been informed by competent medical authority of the nature and work-related cause of the disease. Rutledge v. Stroh Cos., 105 N.C. App. 307, 412 S.E.2d 901 (1991), cert. denied, 331 N.C. 384, 417 S.E.2d 791 (1992).

§ 97-60. (Effective October 1, 1994 — See editor's note) Examination of employees by advisory medical committee; designation of industries with dust hazards.

The compulsory examination of employees and prospective employees as herein provided applies only to persons engaged or about to engage in an occupation which has been found by the Industrial Commission to expose them to the hazards of asbestosis and/or silicosis. The Industrial Commission shall designate by order each industry found subject to any such hazard and shall notify the employers therein before such examinations are required. On and after March 26, 1935, it shall be the duty of every employer, in the conduct of whose business his employees or any of them are subjected to the hazard of asbestosis and/or silicosis, to provide prior to employment necessary examinations of all new employees for the purpose of ascertaining if any of them are in any degree affected by asbestosis and/or silicosis or peculiarly susceptible thereto; and every such employer shall from time to time, as ordered by the Industrial Commission, provide similar examinations for all of his employees whose employment exposes them to the hazards of asbestosis and/or silicosis. At least one member of the advisory medical committee or other physician designated by the Industrial Commission shall make such examinations or be present when any such examination is made. The refusal of an employee to submit to any such examination shall bar such employee from compensation or other benefits provided by this Article in the event of disablement and/or death resulting from exposure to the hazards of asbestosis and/or silicosis subsequent to such refusal. It shall be the duty of the Industrial Commission to make and/or order inspections of employments and to keep a record of all employments subjecting employees to the hazards of asbestosis and/or silicosis, and to notify the employer in any case where such hazard shall have been found to exist. The unreasonable failure of an employer to provide for any examination or his unreasonable refusal to permit any inspection herein authorized shall constitute a Class 1 misdemeanor and shall be punishable as such. (1935, c. 123; 1993, c. 539, s. 678; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in the last sentence.

§ 97-73. Expenses of making examinations.

(a) The Industrial Commission shall establish a schedule of fees for examinations conducted and reports made pursuant to G.S. 97-61.1 through 97-61.6 and 97-67 through 97-71. The fees shall be collected in accordance with rules adopted by the Industrial Commission.

(b) The Secretary of Environment, Health, and Natural Resources shall establish a schedule of fees for examinations conducted by the Department of Environment, Health, and Natural Resources pursuant to G.S. 97-60. The fees shall be collected in accordance with rules adopted by the Secretary of Environment, Health, and Natural Resources.

(c) Fees imposed pursuant to this section shall be collected from employers who by order of the Industrial Commission are determined to be subject to the hazards of asbestosis or silicosis. (1935, c. 123; 1955, c. 525, s. 8; 1991, c. 481, s. 2; 1991 (Reg. Sess., 1992), c. 1039, s. 2.)

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective July 24, 1992, rewrote this section.

§ 97-76. (Effective October 1, 1994 — See editor's note) Inspection of hazardous employments; refusal to allow inspection made misdemeanor.

The Industrial Commission shall make inspections of employments for the purpose of ascertaining whether such employments, or any of them, are subject to the hazards of asbestosis and/or silicosis, and for the purpose of making studies and recommendations with a view to reducing and/or eliminating such hazards. The Industrial Commission, and/or any person selected by it, is authorized to enter upon the premises of employers where employments covered by this Article are being carried on to make examinations and studies as aforesaid. Any employer, or any officer or agent of any employer, who unreasonably prevents or obstructs any such examinations or study shall be guilty of a Class 1 misdemeanor. (1935, c. 123; 1993, c. 539, s. 679; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor" in the last sentence.

§ 97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.

(a) There is hereby created a commission to be known as the North Carolina Industrial Commission, consisting of seven commissioners who shall devote their entire time to the duties of the Commission. The Governor shall appoint the members of the Commission, one for a term of two years, one for a term of four years, and one for a term of six years. Of the additional appointments made in 1994, one shall be for a term expiring June 30, 1996, one for a term expiring June 30, 1998, and two for terms expiring June 30, 2000. Upon the expiration of each term as above mentioned, the Governor shall appoint a successor for a term of six years, and thereafter the term of office of each commissioner shall be six years. Not more than three appointees shall be persons who, on account of their previous vocations, employment or affiliations, can be classed as representatives of employers, and not more than three appointees shall be persons who, on account of their previous vocations, employment or affiliations, can be classed as representatives of employees.

(b) One member, to be designated by the Governor, shall act as chairman. The chairman shall be the chief judicial officer and the chief executive officer of the Industrial Commission; such authority shall be exercised pursuant to the provisions of Chapter 126 of the General Statutes and the rules and policies of the State Personnel

Commission. Notwithstanding the provisions of this Chapter, the chairman shall have such authority as is necessary to direct and oversee the Commission. The chairman may delegate any duties and responsibilities as may be necessary to ensure the proper management of the Industrial Commission. Notwithstanding the provisions of this Chapter, Chapter 143A, and Chapter 143B of the General Statutes, the chairman may hire or fire personnel and transfer personnel within the Industrial Commission.

The Governor may designate one vice-chairman from the remaining commissioners. The vice-chairman shall assume the powers of the chairman upon request of the chairman or when the chairman is absent for 24 hours or more. The authority delegated to the vice-chairman shall be relinquished immediately upon the return of the chairman or at the request of the chairman. (1929, c. 120, s. 51; 1931, c. 274, s. 8; 1991, c. 264, s. 1; 1993, c. 399, s. 3; 1993 (Reg. Sess., 1994), c. 769, s. 28.15(a).)

Editor's Note. —

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Effect of Amendments. —

The 1993 amendment, effective July 19, 1993, in the last sentence of the first paragraph of subsection (b), substituted "chairman may" for "chairman, with the approval of at least one of the other commissioners, shall have the authority to," and deleted "to" preceding "transfer personnel."

The 1993 (Reg. Sess., 1994) amendment, effective August 1, 1994, and applicable to appointments made on or after that date, substituted "seven" for "three" in the first sentence of subsection (a), added the third sentence of that subsection, twice substituted "three appointees" for "one appointee" in the last sentence of that subsection, making related changes, and deleted "two" preceding "commissioners" in the first sentence of the second paragraph of subsection (b).

CASE NOTES

Cited in Abels v. Renfro Corp., 108 N.C. App. 135, 423 S.E.2d 479 (1992).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The Opinion of the Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990), annotated under this section in the main volume, should be disregarded, in light of the 1991 amendment to this section.*

§ 97-77.1. [Expires July 1, 1997] Advisory council.

The chairman of the Commission may appoint an advisory council to advise the chairman on workers' compensation issues and other matters within the jurisdiction of the Commission. The members of the council shall serve at the pleasure of the chairman. The members of the council shall not receive compensation for their service on the council. (1993 (Reg. Sess., 1994), c. 679, s. 5.1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1, made this section effective September 1, 1994 and provides that this section expires July 1, 1997.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-78. Salaries and expenses; secretary and other clerical assistance; annual report.

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — *The Opinion of the Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990), annotated under this section in the main volume, should be disregarded, in light of the 1991 amendment to § 97-77.*

§ 97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.

(a) The Commission shall be provided with adequate offices in which the records shall be kept and its official business transacted during regular business hours; it shall also be provided with necessary office furniture, stationery, and other supplies.

(b) The Commission may appoint deputies who shall have the same power as members of the Commission pursuant to G.S. 97-80 and the same power to take evidence, and enter orders, opinions, and awards based thereon as is possessed by the members of the Commission. The deputies shall be subject to the State Personnel System.

(c) The Commission or any member thereof may hold sessions at any place within the State as may be deemed necessary by the Commission.

(d) Hearings before the Commission shall be open to the public and shall be stenographically reported, and the Commission is authorized to contract for the reporting of such hearings. The Commission shall by regulation provide for the preparation of a record of the hearings and other proceedings. Notwithstanding the provisions of this subsection, informal hearings conducted pursuant to the provisions of G.S. 97-18.1, whether by telephone or in person, shall not be open to the public nor stenographically reported unless the Commission orders otherwise.

(e) The Commission, or any member thereof, or any deputy is authorized by appropriate order, to make additional parties plaintiff or defendant in any proceeding pending before the Commission when it is made to appear that such new party is either a necessary party or a proper party to a final determination of the proceeding.

(f) The Commission shall create an ombudsman program to assist unrepresented claimants, employers, and other parties, to enable them to protect their rights under this Article. In addition to other duties assigned by the Commission, the ombudsman shall meet with, or otherwise provide information to, injured employees, investigate complaints, and communicate with employers' insurance carriers and physicians at the request of the claimant. Assistance provided under this subsection shall not include representing the claimant in a compensation hearing. (1929, c. 120, s. 53; 1931, c. 274, s. 10; 1951, c. 1059, s. 7; 1955, c. 1026, s. 11; 1971, c. 527, s. 2; c. 1147, s. 2; 1981 (Reg. Sess., 1982), c. 1243, s. 1; 1993 (Reg. Sess., 1994), c. 679, s. 5.2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, which amended this section, in s. 11.1 provides that the act is effective upon ratification (July 5, 1994), except as otherwise provided. Section 11.1(a) provides that the amendment to subsection (d) of this section becomes effective October 1, 1994, and applies to claims pending on or filed after that date, and s. 11.1(e) provides that the amendment to subsection (f) of this section becomes effective July 1, 1994.

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 5.2, "The Workers' Compensation Reform Act of 1994," divided subsection (b) into two sentences by substituting "The deputies" for "and such deputy or deputies" at the beginning of the second sentence, substituted "as members of the Commission pursuant to G.S. 97-80 and the same power to" for "to issue subpoenas, administer oaths, conduct hearings, hold persons, firms or corporations in contempt as provided in Chapter 5A of the General Statutes" in the first sentence of subsection (b); added the last sentence of subsection (d); deleted "North Carolina Industrial" preceding "Commission" twice in subsection (e); and added subsection (f). For effective date and applicability, see the editor's note.

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The Opinion of the Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990), annotated under this section in the main volume, should be disregarded, in light of the 1991 amendment to § 97-77.*

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

(a) The Commission may make rules, not inconsistent with this Article, for carrying out the provisions of this Article. Processes, procedure, and discovery under this Article shall be as summary and simple as reasonably may be.

(b) The Commission or any member thereof, or any person deputized by it, shall have the power, for the purpose of this Article, to tax costs against the parties, to administer or cause to have administered oaths, to preserve order at hearings, to compel the attendance and testimony of witnesses, and to compel the production of books, papers, records, and other tangible things.

(c) **(See editor's note)** The Commission may order parties to participate in mediation, under rules substantially similar to those approved by the Supreme Court for use in the Superior Court division, except the Commission shall determine the manner in which payment of the costs of the mediated settlement conference is assessed.

(d) The Commission may order testimony to be taken by deposition and any party to a proceeding under this Article may, upon application to the Commission, which application shall set forth the materiality of the evidence to be given, cause the depositions of witnesses residing within or without the State to be taken, the costs to be taxed as other costs by Commission. Depositions ordered by the Commission upon application of a party shall be taken after giving the notice and in the manner prescribed by law for depositions in action at law, except that they shall be directed to the Commission, the commissioner, or the deputy commissioner before whom the proceedings may be pending.

(e) A subpoena may be issued by the Commission and served in accordance with G.S. 1A-1, Rule 45. Upon a motion, the Commission may quash a subpoena if it finds that the evidence the production of which is required does not relate to a matter in issue, the subpoena does not describe with sufficient particularity the evidence the production of which is required, of [or] for any other reason sufficient in law the subpoena may be quashed. Each witness who appears in obedience to such subpoena of the Commission shall receive for attendance the fees and mileage for witnesses in civil cases in courts of the county where the hearing is held.

(f) The Commission may by rule provide for and limit the use of interrogatories and other forms of discovery, and it may provide reasonable sanctions for failure to comply with a Commission order compelling discovery.

(g) The Commission or any member or deputy thereof shall have the same power as a judicial officer pursuant to Chapter 5A of the General Statutes to hold a person in civil contempt, as provided thereunder, for failure to comply with an order of the Commission, Commission member, or deputy. A person held in civil contempt may appeal in the manner provided for appeals pursuant to G.S. 97-85 and G.S. 97-86. The provisions of G.S. 5A-24 shall not apply to appeals pursuant to this subsection.

(h) The Commission or any member or deputy thereof shall also have the same power as a judicial officer pursuant to Chapter 5A of the General Statutes to punish for criminal contempt, subject to the limitations thereunder, (i) for wilful behavior committed during the sitting of the commissioner or deputy commissioner and directly tending to interrupt the proceedings; (ii) for wilful disobedience of a lawful order of the Commission or a member or deputy thereof; or (iii) for wilful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, wilful refusal to answer any legal and proper question when refusal is not legally justified. The Commission or any member or deputy thereof may issue an order of arrest as provided by G.S. 15A-305 when authorized by G.S. 5A-16 in connection with contempt proceedings. When the commissioner or deputy commissioner chooses not to proceed summarily pursuant to G.S. 5A-14, the proceedings shall be before a district court judge, and venue lies throughout the district where the order was issued directing the person charged to appear. A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions to the superior court of the district in which the order of contempt was issued, and the appeal is by hearing de novo before a superior court judge. (1929, c. 120, s. 54; 1977, cc. 456, 505; 1981 (Reg. Sess., 1982), c. 1243, s. 2; 1993, c. 321, s. 25(b); c. 399, s. 1; 1993 (Reg. Sess., 1994), c. 679, ss. 5.3, 5.4.)

Editor's Note. —

The bracketed word "or" has been inserted in subsection (e) as the apparently intended word.

Session Laws 1993, c. 399, s. 5 which amended this section, provided that ss. 1, 2 and 4 of c. 399 became effective October 1, 1993 only if the General Assembly appropriated funds to implement the purpose of these sections. Section 5 of c.

399 also provided that ss. 1, 2 and 4 would expire June 30, 1995, and applied to claims pending on or filed after the effective date of c. 399. As of the date of publication of the 1994 supplement, no specific appropriation appears to have been made.

Session Laws 1993, c. 321, s. 25(b) provides that, if HB 658 (Session Laws 1993, c. 399) is enacted, the first sentence of s. 4 of c. 399 is amended by deleting "only if the General Assembly appropriates funds to implement the purpose of this act." However, this language is in the second sentence of section 5 of Chapter 399 and reads "only if the General Assembly appropriates funds to implement the purpose of these sections."

Session Laws 1993, c. 399, s. 4 provides: "The mediation program authorized by this act shall be evaluated under the direction of the Attorney General who shall file a written report on the evaluation of the program on or before May 1, 1995. One copy of the report shall be sent to the Speaker of the House of Representatives, one copy shall be sent to the President Pro Tempore of the Senate, and five copies shall be sent to the Legislative Services Commission for placement in the Legislative Library."

Session Laws 1993 (Reg. Sess., 1994), c. 679, which amended this section, in s. 5.4 provides: "Subsection (c) of G.S. 97-80 shall expire June 30, 1995, in accordance with the provisions of Chapter 399 of the 1993 Session Laws, unless the General Assembly amends Chapter 399 of the 1993 Session Laws to provide otherwise."

Effect of Amendments. — The 1993 amendment, effective October 1, 1993, added the fourth sentence of subsection (a) (now redesignated as subsection (c)) beginning "The Commission may order." As to the effective date, expiration date and applicability of this amendment, see the Editor's Note.

Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 5.3, "The Workers' Compensation Reform Act of 1994," effective July 5, 1994, divided, redesignated and rewrote former subsections (a) and (b) to form present subsections (a) through (e), deleted former subsection (c), and added subsections (f) through (h). As to the applicability and expiration of present subsection (c), see the editor's note.

§ 97-81. Blank forms and literature; statistics; safety provisions; accident reports; studies and investigations and recommendations to General Assembly; to cooperate with other agencies for prevention of injury.

(a) The Commission shall prepare and cause to be printed, and upon request furnish, free of charge to any employee or employer, such blank forms and literature as it shall deem requisite to facilitate or prompt the efficient administration of this Article. The Commission may authorize the use of electronic submission of forms and other means of transmittal of forms and notices when it deems appropriate.

(b) The Commission shall tabulate the accident reports received from employers in accordance with G.S. 97-92 and shall publish the same in the annual report of the Commission and as often as it may deem advisable, in such detailed or aggregate form as it may deem best. The name of the employer or employee shall not appear in such publications, and the employers' reports shall be private records of the Commission, and shall not be open for public inspection except for the inspection of the parties directly involved, and only to the extent of such interest, and except for inspection by the Department of Labor and other State or federal agencies pursuant to subsections (d) and (e) of this section. These reports shall not be used as evidence against any employer in any suit at law brought by any employee for the recovery of damages.

(c) The Commission shall make studies and investigations with respect to safety provisions and the causes of injuries in employments covered by this Article, and shall from time to time make to the General Assembly and to employers and carriers such recommendations as it may deem proper as to the best means of preventing such injuries.

(d) In making such studies and investigations the Commission shall:

(1) Cooperate with any agency of the United States charged with the duty of enforcing any law securing safety against injury in any employment covered by this Article, or with any State agency engaged in enforcing any laws to assure safety for employees, and

(2) Permit any such agency to have access to the records of the Commission.

In carrying out the provisions of this section the Commission or any officer or employee of the Commission is authorized to enter at any reasonable time upon any premises, tracks, wharf, dock, or other landing place, or to enter any building, where an employment covered by this Article is being carried on, and to examine any tool, appliance, or machinery used in such employment.

(e) The Commission shall, upon written request from the Commissioner of Labor, provide from the Commission's records the following information from claims filed by employees, and from employer reports of injury to an employee required by G.S. 97-92:

(1) Name and business address of the employer;
(2) Type of business of the employer;
(3) Date the accident, illness, or injury occurred;
(4) Nature of the injury or disease reported; and
(5) Whether compensation for disability or medical expenses was paid to the injured employee.

Information provided to the Commissioner of Labor pursuant to this subsection, and to other State and federal agencies pursuant to subsection (d) of this section, shall be private and exempt from public inspection to the same extent that records of the Commission are so exempt. (1929, c. 120, s. 55; 1991 (Reg. Sess., 1992), c. 894, s. 2; 1993 (Reg. Sess., 1994), c. 679, s. 10.2.)

Effect of Amendments. — The 1991 (Reg. Sess., 1992) amendment, effective July 8, 1992, added the language beginning "and except for inspection" in the second sentence of subsection (b), in subsection (d) substituted "shall" for "is authorized" in the introductory language, and deleted "To" at the beginning of subdivisions (1) and (2), and added subsection (e).

Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 10.2, "The Workers' Compensation Reform Act of 1994," effective July 5, 1994, added the last sentence of subsection (a).

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval; direct payment as award.

(a) If the employer and the injured employee or his dependents reach an agreement in regard to compensation under this Article, they may enter into a memorandum of the agreement in the form prescribed by the Commission.

An agreement, however, shall be incorporated into a memorandum of agreement in regard to compensation: (i) for loss or permanent injury, disfigurement, or permanent and total disability under G.S. 97-31, (ii) for death from a compensable injury or occupational disease under G.S. 97-38, or (iii) when compensation under this Article is paid or payable to an employee who is incompetent or under 18 years of age.

The memorandum of agreement, accompanied by a full and complete medical report, shall be filed with and approved by the Commission; otherwise such agreement shall be voidable by the employee or his dependents.

(b) If approved by the Commission, a memorandum of agreement shall for all purposes be enforceable by the court's decree as hereinafter specified. Payment pursuant to G.S. 97-18(b), or payment pursuant to G.S. 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice, shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury for which payment was made. Compensation paid in these circumstances shall constitute payment of compensation pursuant to an award under this Article. (1929, c. 120, s. 56; 1993 (Reg. Sess., 1994), c. 679, s. 3.2.)

Editor's Note. — G.S. 97-18(d) referred to in subsection (b), was redesignated as subsection (f).

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.2, "The Workers' Compensation Reform Act of 1994," effective January 1, 1995, and applicable to claims pending on or filed after that date, added "direct payment as award" in the section catch line, inserted the subsection designations, and rewrote the section, in part by adding the last two undesignated paragraphs of subsection (a) and by adding the last two sentences of subsection (b).

Legal Periodicals. —

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

CASE NOTES

Commission May Not Set Aside a Duly Executed Agreement. — Absent a showing of fraud, misrepresentation, mutual mistake, or undue influence, the Industrial Commission may not set aside a settlement agreement duly executed by the parties, properly submitted to the Industrial Commission for approval, and approved by the Chairman of the Commission in accordance with § 97-17 and this section. The fact that defense counsel had attempted to revoke its consent to the agreement after it was submitted to the Commission was immaterial. Glenn v. McDonald's, 109 N.C. App. 45, 425 S.E.2d 727 (1993).

Cited in Vernon v. Steven L. Mabe Bldrs., 110 N.C. App. 552, 430 S.E.2d 676 (1993).

§ 97-83. Commission is to make award after hearing.

If the employer and the injured employee or his dependents fail to reach an agreement in regard to benefits under this Article within 14 days after the employer has written or actual notice of the injury or death, or upon the arising of a dispute under this Article, either party may make application to the Commission for a hearing in regard to the matters at issue, and for a ruling thereon.

Immediately after such application has been received the Commission shall set the date of a hearing, which shall he held as soon as practicable and shall notify the parties at issue of the time and place of such hearing. The hearing or hearings shall be held in the city or county where the injury occurred, unless otherwise authorized by the Commission. (1929, c. 120, s. 57; 1955, c. 1026, s. 12½; 1977, c. 743; 1993 (Reg. Sess., 1994), c. 679, s. 3.3.)

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.3, "The Workers' Compensation Reform Act of 1994," effective January 1, 1995, and applicable to claims pending on or filed after that date, deleted "In event of disagreement" at the beginning of the section catchline, and rewrote the section.

§ 97-83.1. Facilities for hearings; security.

The senior resident superior court judge shall provide suitable facilities for the conduct of hearings under this Article in the county or counties within the judge's district at the time the Commission schedules hearings therein. The senior resident superior court judge shall, to the extent the judge determines necessary and practicable, provide or arrange for security at Commission hearings upon the request of a member or deputy of the Commission. (1993 (Reg. Sess., 1994), c. 679, s. 5.7.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1, made this section effective upon ratification. The act was ratified July 5, 1994.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-84. Determination of disputes by Commission or deputy.

CASE NOTES

Quoted in Viergegge v. North Carolina State Univ., 105 N.C. App. 633, 414 S.E.2d 771 (1992).

§ 97-85. Review of award.

CASE NOTES

Deputy Commissioner's Findings of Fact Not Conclusive. — The deputy commissioner's findings of fact are not conclusive; only the Full Commission's findings of fact are conclusive. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Upon appeal from a deputy commissioner's award, the Commission may receive further evidence regardless of whether it was newly discovered evidence. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

The Commission may weigh the evidence presented to the deputy commissioner and make its own determination as to the weight and credibility of the evidence. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

The Commission may strike the deputy commissioner's findings of fact even if no exception was taken to the findings. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Plenary Powers of Commission to Review Awards. —

In accord with second paragraph in the main volume. See Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Commission to Decide All Matters in Controversy. — When the matter is "appealed" to the full commission pursuant to this section, it is the duty and responsibility of the full commission to decide all of the matters in controversy between the parties. Viergegge v. North Carolina State Univ., 105 N.C. App. 633, 414 S.E.2d 771 (1992).

Taking of Additional Evidence on Review. —

The party against whom an award has been made does not have a substantive right to require the Full Commission to hear new or additional testimony. It may, and should, do so if the due administration of justice requires. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Commission may decide to exclude evidence which it has previously seen fit to hear, where the decision to take additional evidence is discretionary in nature and neither party has put forth good cause for such evidence to be considered. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Where it was within the Commission's power to ask for additional medical evidence, it was also within its power to exclude such evidence. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Waiver of Right to Remand. — Where plaintiff had not assigned as error the failure of the Industrial Commission to afford him the review to which he was entitled under this section, and where plaintiff failed to argue that he was prejudiced in any way by any error upon the part of the full Commission, remand was not required. Faircloth v. North Carolina DOT, 106 N.C. App. 303, 416 S.E.2d 409 (1992).

Failure of Commission to Make Findings and Conclusions. — The Industrial Commission failed to carry out its statutory duties pursuant to this section by not making its own findings of fact and conclusions of law to support its disposition of plaintiff's claim. However, despite the failure of the Commission to make its own findings and conclusions, there was no prejudice to plaintiff. Jauregui v. Carolina Vegetables, 112 N.C. App. 593, 436 S.E.2d 268 (1993).

For preferred format of Industrial Commission's review of awards by deputy commissioner, see Crump v. Independence Nissan, 112 N.C. App. 587, 436 S.E.2d 589 (1993).

Stated in Pernell v. Piedmont Circuits, 104 N.C. App. 289, 409 S.E.2d 618 (1991).

Cited in Hardin v. Venture Constr. Co., 107 N.C. App. 758, 421 S.E.2d 601 (1992); Brewington v. North Carolina Dep't of Cor., 111 N.C. App. 833, 433 S.E.2d 798 (1993).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The Opinion of the Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990), annotated under this section in the main volume, should be disregarded in light of the 1991 amendment to § 97-77.*

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.

The award of the Industrial Commission, as provided in G.S. 97-84, if not reviewed in due time, or an award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within 30 days from the date of such award or within 30 days after receipt of notice to be sent by registered mail or certified mail of such award, but not thereafter, appeal from the decision of said Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. The procedure for the appeal shall be as provided by the rules of appellate procedure.

The Industrial Commission of its own motion may certify questions of law to the Court of Appeals for decision and determination by said Court. In case of an appeal from the decision of the Commission, or of a certification by said Commission of questions of law, to the Court of Appeals, said appeal or certification shall operate on a supersedeas except as provided in G.S. 97-86.1, and no employer shall be required to make payment of the award involved in said appeal or certification until the questions at issue therein shall have been fully determined in accordance with the provisions of this Article. If the employer is a noninsurer, then the appeal of such employer shall not act as a supersedeas and the plaintiff in such case shall have the same right to issue execution or to satisfy the award from the property of the employer pending the appeal as obtains to the successful party in an action in the superior court.

When any party to an appeal from an award of the Commission is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, any member of the Commission or any deputy commissioner may, in their discretion, enter an order allowing said party to appeal from the award of the Commission without giving security therefor. The party appealing from the judgment shall, within 30 days from the filing of the appeal from the award, make an affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by a practicing attorney that there is error in the matters of law in the award of the Commission in said case. The affidavit must be accompanied by a written statement from a practicing attorney of North Carolina that he has examined the affiant's case and is of the opinion that the decision of the Commission in said case is contrary to law. The request shall be passed upon and granted or denied by a member of the Commission or deputy commissioner within 20 days from receipt of the affidavit and letter as specified above. (1929, c. 120, s. 60; 1947, c. 823; 1957, c. 1396, s. 9; 1959, c. 863, s. 4; 1967, c. 669; 1971, c. 1189; 1975, c. 391, s. 15; 1977, c. 521, s. 1; 1993 (Reg. Sess., 1994), c. 679, s. 10.5.)

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 10.5, "The Workers' Compensation Reform Act of 1994," effective July 5, 1994, in the third paragraph, substituted "any member of the Commission or any deputy commissioner may, in their discretion" for "the chairman of the Industrial Commission may, in his discretion" in the first sentence, substituted "appealing" for "desiring to appeal" and "appeal from the award" for "award by the full Commission" in the second sentence, and, in the last sentence, deleted "for appeal" following "request" and substituted "a member of the Commission or deputy commissioner within 20 days" for "the chairman of the Commission within 30 days."

CASE NOTES

I. In General.

I. IN GENERAL.

Applied in Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

Cited in Goins v. Sanford Furn. Co., 105 N.C. App. 244, 412 S.E.2d 172 (1992); Blankley v. White Swan Uniform Rentals, 107 N.C. App. 751, 421 S.E.2d 603 (1992); Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The Opinion of the Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990), annotated under this section in the main volume, should be disregarded, in light of the 1991 amendment to § 97-77.*

§ 97-88. Expenses of appeals brought by insurers.

CASE NOTES

Applied in Poplin v. PPG Indus., 108 N.C. App. 55, 422 S.E.2d 353 (1992); Matthews v. Petroleum Tank Serv., Inc., 108 N.C. App. 259, 423 S.E.2d 532 (1992).

§ 97-88.1. Attorney's fees at original hearing.

CASE NOTES

Applied in Poplin v. PPG Indus., 108 N.C. App. 55, 422 S.E.2d 353 (1992); Matthews v. Petroleum Tank Serv., Inc., 108 N.C. App. 259, 423 S.E.2d 532 (1992).

§ 97-88.2. Penalty for misrepresentation.

(a) Any person who willfully makes a false statement or representation of a material fact for the purpose of obtaining or denying any benefit or payment, or assisting another to obtain or deny any benefit or payment under this Article, shall be guilty of a Class 1 misdemeanor. The court may order restitution.

(b) The Commission shall refer all cases of suspected fraud and all violations related to workers' compensation claims, by or against insurers or self-funded employers, to the Department of Insurance to:

(1) Perform investigations and refer possible criminal violations to the appropriate prosecutorial authorities;
(2) Conduct administrative violation proceedings; and
(3) Assess and collect penalties and restitution.

(c) Any person who threatens an employee with criminal prosecution under the provisions of subsection (a) of this section for the purpose of coercing or attempting to coerce the employee into agreeing to compensation under this Article shall be guilty of a Class 1 misdemeanor.

(d) The Commission shall not be liable in a civil action for any action made in good faith under this section, including the identification and referral of a person for investigation and prosecution for an alleged administrative violation or criminal offense. Any person, including, but not limited to, an attorney, an employee, an employer, an insurer, and an employee of an insurer, who in good faith comes forward with information under this section, shall not be liable in a civil action.

(e) The Commission shall report annually to the General Assembly on the number and disposition of investigations involving claimants, employers, insurance company officials, officials of third-party administrators, insurance agents, attorneys, health care providers, and vocational rehabilitation providers. (1993 (Reg. Sess., 1994), c. 679, s. 7.1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(c), made this section effective October 1, 1994, and applicable to violations occurring on or after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-88.3. Penalty for health care providers.

(a) In addition to any liability under G.S. 97-88.2, any health care provider who willfully or intentionally undertakes the following acts is subject to an administrative penalty, assessed by the Commission, not to exceed ten thousand dollars ($10,000):

(1) Submitting charges for health care that was not furnished;
(2) Fraudulently administering, providing, and attempting to collect for inappropriate or unnecessary treatment or services; or
(3) Violating the provisions of Article 28 of Chapter 90 of the General Statutes.

A penalty assessed by the Commission for a violation of subdivision (3) of this subsection is in addition to penalties assessed under G.S. 90-407.

(b) In addition to any liability under G.S. 97-88.2, any health care provider who willfully or intentionally undertakes the following acts is subject to an administrative penalty, assessed by the Commission, not to exceed one thousand dollars ($1,000):

(1) Failing or refusing to timely file required reports or records;
(2) Making unnecessary referrals; and
(3) Knowingly violating this Article or rules promulgated hereunder, including treatment guidelines, with intention to deceive or to gain improper advantage of a patient, employee, insurer, or the Commission.

(c) A health care provider who knowingly charges or otherwise holds an employee financially responsible for the cost of any services provided for a compensable injury under this Article is guilty of a Class 1 misdemeanor.

(d) Any person, including, but not limited to, an employer, an insurer, and an employee of an insurer, who in good faith comes forward with information under this section, shall not be liable in a civil action.

(e) Information relating to possible violations under this section shall be reported to the Commission which shall refer the same to the appropriate licensing or regulatory board or authority for the health care provider involved.

(f) A hospital that relies in good faith on a written order of a physician in performing health care services shall not be subject to an administrative penalty in violation of this section. (1993 (Reg. Sess., 1994), c. 679, s. 7.2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(c), made this section effective October 1, 1994, and applicable to violations occurring on or after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-90. (See editor's note for date change) Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims; agreement for fee or compensation.

(a) Fees for attorneys and charges of health care providers for medical compensation under this Article shall be subject to the approval of the Commission; but no physician or hospital or other medical facilities shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Commission in connection with the case. Except as provided in G.S. 97-26(g), a request for a specific prior approval to charge shall be submitted to the Commission for each such fee or charge.

(b) **(Effective October 1, 1994 — See editor's note)** Any person (i) who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the Commission or the court, as provided in subsection (c), or (ii) who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, shall be guilty of a Class 1 misdemeanor.

(c) If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed. If within five days after receipt of notice of such fee allowance, the attorney shall file notice of appeal to the full Commission, the full Commission shall hear the matter and determine whether or not the attorney's agreement as to a fee or the fee allowed is unreasonable. If the full Commission is of the opinion that such agreement or fee allowance is unreasonable and so finds, then the attorney may, by filing written notice of appeal within 10 days after receipt of such action by the full Commission, appeal to the senior resident judge of the superior court in the county in which the cause of action arose or in which the claimant resides; and upon such appeal said judge shall consider the matter and determine in his discretion the reasonableness of said agreement or fix the fee and direct an order to the Commission following his determination therein. The Commission shall, within 20 days after receipt of notice of appeal from its action concerning said agreement or allowance, transmit its findings and reasons as to its action concerning such agreement or allowance to the judge of the superior court designated in the notice of appeal. In all other cases where there is no agreement for fee or compensation, the attorney or claimant may, by filing written notice of appeal within five days after receipt of notice of action of the full Commission with respect to attorneys' fees, appeal to the senior resident judge of the superior court of the district of the county in which the cause arose or in which the claimant resides; and upon such appeal said judge shall consider the matter of such fee and determine in his discretion the attorneys' fees to be allowed in the cause. The Commission shall, within 20 days after notice of appeal has been filed, transmit its findings and reasons as to its action concerning such fee or compensation to the judge of the superior court designated in the notice of appeal; provided that the Commission shall in no event have any jurisdiction over any attorneys' fees in any third-party action. In any case in which an attorney appeals to the superior court on the question of attorneys' fees, the appealing attorney shall notify the Commission and the employee of any and all proceedings before the superior court on the appeal, and either or both may appear and be represented at such proceedings.

The Commission, in determining an allowance of attorneys' fees, shall examine the record to determine the services rendered. The factors which may be considered by the Commission in allowing a reasonable fee include, but are not limited to, the time invested, the amount involved, the results achieved, whether the fee is fixed or contingent, the customary fee for similar services, the experience and skill level of the attorney, and the nature of the attorney's services.

In making the allowance of attorneys' fees, the Commission shall, upon its own motion or that of an interested party, set forth findings sufficient to support the amount approved.

The Commission may deny or reduce an attorney's fees upon proof of solicitation of employment in violation of the Rules of Professional Conduct of the North Carolina State Bar.

(d) Provided, that nothing contained in this section shall prevent the collection of such reasonable fees of physicians and charges for hospitalization as may be recovered in an action, or embraced in settlement of a claim, against a third-party tort-feasor as described in G.S. 97-10.2.

(e) A health care provider shall not pursue a private claim against an employee for all or part of the costs of medical treatment provided to the employee by the provider unless the employee's claim or the treatment is finally adjudicated not to be compensable or the employee fails to request a hearing after denial of liability by the employer. Notwithstanding subsequent denial of liability or adjudication that the condition treated was not compensable, the insurer shall be liable as provided in G.S. 97-26 to providers whose services have been authorized by the insurer or employer. The statute of limitations applicable to a provider's claim for payment shall be tolled during the period the compensability of a claim or liability for particular treatment remains an issue in a compensation case. (1929, c. 120, s. 64; 1955, c. 1026, s. 4; 1959, cc. 1268, 1307; 1973, c. 520, s. 4; 1981, c. 521, s. 4; 1991, c. 703, s. 6; 1993, c. 539, s. 680; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 679, s. 9.1.)

Editor's Note. —

Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. —

The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor, and upon conviction thereof shall, for each offense, be punished by a fine of not more than five hundred dollars ($500.00) or by imprisonment not to exceed one year, or by both such fine and imprisonment" in subsection (b).

Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 9.1, "The Workers' Compensation Reform Act of 1994," effective July 5, 1994, substituted "charges of health care providers" for "physicians and charges of hopitals" in the first sentence of subsection (a), deleted "Industrial" preceding "Commission in connection" in that sentence, and substituted "Except as provided in G.S. 97-26(g)" for "Unless otherwise provided by the rules, schedules, or orders of the Commission" in the second sentence of subsection (a); substituted "the court, as provided in subsection (c)" for "such court" in subsection (b); in the first paragraph of subsection (c), inserted "senior" in the fifth and seventh sentences, deleted "or the judge holding the courts of the district of or" following "superior court" in the fifth sentence, deleted "or the judge holding the courts" in the seventh sentence, and added the last sentence; added the last three paragraphs of subsection (c); substituted "G.S. 97-10.2" for "G.S. 97-10" in subsection (d); deleted former subsection (e), which provided for a deadline for the approval of fees and their effective date; and added present subsection (e).

CASE NOTES

Less Than 100% Credit Was Within Commission's Authority. — Where the Commission's award allowed the defendant credit for payments that they had already made through their private insurer less only the plaintiff's reasonable attorney's fees calculated and based upon the amount of the entire worker's compensation award, the award was authorized by the statute since all credit given by the Commission in these circumstances is "subject to the approval" of the Industrial Commission. Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

§ 97-91. Commission to determine all questions.

CASE NOTES

Cited in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992); Abels v. Renfro Corp., 108 N.C. App. 135, 423 S.E.2d 479 (1992).

§ 97-92. Employer's record and report of accidents; records of Commission not open to public; supplementary report upon termination of disability; penalty for refusal to make report; when insurance carrier liable.

(a) Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment on blanks approved by the Commission. Within five days after the occurrence and knowledge thereof as provided in G.S. 97-22 of an injury to an employee, causing his absence from work for more than one day or charges for medical compensation exceeding the amount set by the Commission, a report thereof shall be made in writing and mailed or transmitted to the Commission in the form approved by the Commission for this purpose.

(b) The records of the Commission, insofar as they refer to accidents, injuries, and settlements shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the right to inspect them, and to State and federal agencies pursuant to G.S. 97-81.

(c) Upon the termination of the disability of the injured employee, or if the disability extends beyond a period of 60 days, then, also, at the expiration of such period the employer shall make a supplementary report to the Commission on blanks to be procured from the Commission for the purpose.

(d) The said report shall contain the name, nature, and location of the business of the employer and name, age, sex, and wages and occupation of the injured employee, and shall state the date and hour of the accident causing injury, the nature and cause of the injury, and such other information as may be required by the Commission.

(e) Any employer who refuses or neglects to make the report required by this section shall be liable for a penalty of not less than five dollars ($5.00) and not more than twenty-five dollars ($25.00) for each refusal or neglect. The fine herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases. In the event the employer has transmitted the report to the insurance carrier for transmission by such insurance carrier to the Industrial Commission, the insurance carrier willfully neglecting or failing to transmit the report shall be liable for the said penalty.

(f) Any bill, report, application, and document of every nature and kind, which is required or permitted by Commission rules to be transmitted to the Commission by electronic media or is recorded among the Commission records on computer disk, optical disk, microfilm, or similar media and which is produced or reproduced in written form in the normal course of business or is certified as a true and accurate copy of the data recorded at the Commission in the normal course of its business shall be treated as a signed original in all uses before the Commission and as a duplicate within the meaning of Rule 1003 of the North Carolina Rules of Evidence. (1929, c. 120, s. 66; 1945, c. 766; 1991, c. 703, s. 9; 1991 (Reg. Sess., 1992), c. 894, s. 3; 1993 (Reg. Sess., 1994), c. 679, s. 10.8.)

Effect of Amendments. —

The 1991 (Reg. Sess., 1992) amendment, effective July 8, 1992, added the language beginning "and to State and federal" in subsection (b).

Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 10.8, "The Workers' Compensation Reform Act of 1994," effective July 5, 1994, in the second sentence of subsection (a), inserted "or charges for medical compensation exceeding the amount set by the Commission" and substituted "or transmitted to the Commission in the form approved by" for "to the Industrial Commission on blanks to be procured from."

§ 97-93. Employers required to carry insurance or prove financial ability to pay for benefits; employers required to post notice; self-insured employers regulated by Commissioner of Insurance.

(a) Every employer subject to the provisions of this Article relative to the payment of compensation shall either:

(1) Insure and keep insured his liability under this Article in any authorized corporation, association, organization, or in any mutual insurance association formed by a group of employers so authorized; or

(2) Furnish to the Commissioner of Insurance satisfactory proof of the employer's financial ability, either alone or through membership in a group comprising two or more employers who agree to pool their liabilities under this Article, to directly pay the compensation in the amount and manner and when due as provided for in this Article.

(b) In the case of subdivision (a)(2) of this section, the Commissioner of Insurance may require the deposit of an acceptable security, indemnity, or bond to secure the payment of compensation liabilities as they are incurred. Any individual employer or group of employers who furnish proof of financial ability under subdivision (a)(2) of this section shall be governed in all respects by this Article and by rules adopted by the Commissioner of Insurance.

(c) Payment of dividends to the members of any group of employers who agree to pool their liabilities under subdivision (a)(2) of this section shall not be contingent upon the maintenance or continuance of membership in such pools.

(d) Groups comprising two or more employers who agree to pool their liabilities under subdivision (a)(2) of this section are subject to G.S. 58-3-80, 58-7-50, 58-7-55, 58-7-140, 58-7-160, 58-7-162, 58-7-163, 58-7-165, 58-7-167, 58-7-168, 58-7-170, 58-7-172, 58-7-173, 58-7-177, 58-7-179, 58-7-180, 58-7-183, 58-7-185, 58-7-187, 58-7-188, 58-7-190, 58-7-192, 58-7-193, 58-7-195, 58-7-197, 58-7-200, and Articles 13, 19, and 34 of Chapter 58 of the General Statutes.

(e) Every employer who is in compliance with the provisions of subsection (a) of this section shall post in a conspicuous place in places of employment a notice stating that employment by this employer is subject to the North Carolina Workers' Compensation Act and stating whether the employer has a policy of insurance against liability or qualifies as a self-insured employer. In the event the employer allows its insurance to lapse or ceases to qualify as a self-insured employer, the employer shall, within five working days of this occurrence, remove any notices indicating otherwise. (1929, c. 120, s. 67; 1943, c. 543; 1973, c. 1291, s. 12; 1979, c. 345; 1983, c. 728; 1985, c. 119, s. 1; 1993, c. 120, ss. 1, 2; 1993 (Reg. Sess., 1994), c. 679, s. 8.2.)

Editor's Note. — This section was amended by Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 8.2, in the coded bill drafting format provided by § 120-20.1. However, the section as amended by that act did not include the amendments to subsections (b) and (d) by Session Laws 1993, c. 120, ss. 1 and 2. The section has been set out above at the direction of the Revisor of Statutes.

Effect of Amendments. — The 1993 amendment, effective January 1, 1994, in subsection (b), in the last sentence, substituted "rules adopted" for "such rules as may be promulgated"; and added subsection (d).

Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 8.2, "The Workers' Compensation Reform Act of 1994," effective July 5, 1994, inserted "employers required to post notice" in the section catchline, and added a second subsection (d), which has been redesignated as subsection (e) at the direction of the Revisor of Statutes.

CASE NOTES

Cited in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991); Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

§ 97-94. Employers required to give proof that they have complied with preceding section; penalty for not keeping liability insured; review; liability for compensation; failure to secure payment of compensation a misdemeanor.

(a) Every employer subject to the compensation provisions of this Article shall file with the Commission, in form prescribed by it, as often as the Commission determines to be necessary, evidence of its compliance with the provisions of G.S. 97-93 and all other provisions relating thereto.

(b) Any employer required to secure the payment of compensation under this Article who refuses or neglects to secure such compensation shall be punished by a penalty of one dollar ($1.00) for each employee, but not less than fifty dollars ($50.00) nor more than one hundred dollars ($100) for each day of such refusal or neglect, and until the same ceases; and he shall be liable during continuance of such refusal or neglect to an employee either for compensation under this Article or at law at the election of the injured employee.

The penalty herein provided may be assessed by the Industrial Commission administratively, with the right to a hearing if requested within 30 days after notice of the assessment of the penalty and the right of review and appeal as in other cases. Enforcement of the penalty shall be made by the Office of the Attorney General.

(c) **(Effective October 1, 1994 — See editor's note)** Any employer required to secure the payment of compensation under this Article who willfully refuses or neglects to secure such compensation shall be guilty of a Class 1 misdemeanor.

(d) Any person who, with the ability and authority to bring an employer in compliance with G.S. 97-93, wilfully and intentionally refuses or neglects to bring the employer in compliance, shall be guilty of a Class 1 misdemeanor and may be assessed a civil penalty by the Commission in an amount up to one hundred percent (100%) of the amount of any compensation due the employer's employees injured during the time the employer failed to comply with G.S. 97-93. Notwithstanding the provisions of G.S. 97-101, the Commission may suspend collection or remit all or part of the civil penalty on condition that the employer pays the compensation due and complies with G.S. 97-93. (1929, c. 120, s. 68; 1945, c. 766; 1963, c. 499; 1973, c. 1291, s. 13; 1985, c. 119, s. 4; 1985 (Reg. Sess., 1986), c. 1027, s. 54; 1987, c. 729, s. 17; 1993, c. 539, s. 681; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 679, s. 8.1.)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court" in subsection (c).

Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 8.1, "The Workers' Compensation Reform Act of 1994," effective October 1, 1994, and applicable to violations occurring on or after that date, deleted "within 30 days" following "proof" and substituted "penalty" for "fine" in the section catchline, rewrote subsections (a) and (b), and added subsection (d).

CASE NOTES

Applied in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

§ 97-95. Actions against employers failing to effect insurance or qualify as self-insurer.

CASE NOTES

An employer must pay benefits to its employees, whether the employer has the necessary insurance, is self-insured, or has no insurance at all. Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487, cert. denied, 333 N.C. 169, 424 S.E.2d 406 (1992).

Employer's lack of workers' compensation insurance does not bar an employee's remedy through workers' compensation. Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487, cert. denied, 333 N.C. 169, 424 S.E.2d 406 (1992).

Cited in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

§ 97-99. Law written into each insurance policy; form of policy to be approved by Commissioner of Insurance; cancellation; single catastrophe hazards.

(a) Every policy for the insurance of the compensation herein provided, or against liability therefor, shall be deemed to be made subject to the provisions of this Article. No corporation, association or organization shall enter into any such policy of insurance unless its form shall have been approved by the Commissioner of Insurance. No policy form shall be approved unless the same shall provide a 30-day prior notice of an intention to cancel same by the carrier to the insured by registered mail or certified mail. This shall not apply to the expiration date shown in the policy. The carrier may cancel the policy for nonpayment of premium on 10 days' written notice to the insured, and the insured may cancel the policy on 10 days' written notice to the carrier. Whenever notice of intention to cancel is required to be given by registered or certified mail, no cancellation by the insurer shall be effective unless and until such method is employed and completed.

(b) This Article shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar single catastrophe hazards: Provided, that nothing herein contained shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe. (1929, c. 120, s. 72; 1943, c. 170; 1945, c. 381, s. 1; 1959, c. 863, s. 5; 1967, c. 1218; 1993, c. 504, s. 31.)

Effect of Amendments. — The 1993 amendment, effective July 24, 1993, in the fifth sentence of subsection (a) deleted "by registered mail or certified mail" preceding "to the carrier."

CASE NOTES

Cited in Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992).

§ 97-100. Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; returned or canceled premiums; reports of premiums collected; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices to carrier; employer who carries own risk shall make report on payroll.

(a) The rates charged by all carriers of insurance, including the parties to any mutual insurance association writing insurance against the liability for compensation under this Article, shall be fair, reasonable, and adequate.

(b) Each such insurance carrier shall report to the Commissioner of Insurance, in accordance with such reasonable rules as the Commissioner of Insurance may at any time prescribe, for the purpose of determining the solvency of the carrier and the adequacy of its rates; for such purpose the Commissioner of Insurance may inspect the books and records of such insurance carrier, and examine its agents, officers, and directors under oath.

(c) Every person, partnership, association, corporation, whether organized under the laws of this or any other state or country, every mutual company or association and every other insurance carrier insuring employers in this State against liability for personal injuries to their employees, or death caused thereby, under the provisions of this Article, shall, as hereinafter provided, pay a tax upon the premium received, whether in cash or notes, in this State, or on account of business done in this State, for such insurance in this State, at the rate provided in the Revenue Act then in force, which tax shall be in lieu of all other taxes on such premiums, which tax shall be assessed and collected as hereinafter provided; provided, however, that such insurance carriers shall be credited with all canceled or returned premiums actually refunded during the year on such insurance.

(d) Every such insurance carrier shall, for the six months ending December 31, 1929, and annually thereafter, make a return, verified by the affidavit of its president and secretary, or other chief officers or agents, to the Commissioner of Insurance, stating the amount of all such premiums and credits during the period covered by such return. Every insurance carrier required to make such return shall file the same with the Commissioner of Insurance on or before the first day of April after the close of the period covered thereby, and shall at the same time pay to the State Insurance Commissioner the tax provided in the Revenue Act then in force on such premium ascertained, as provided in subsection (c) hereof, less returned premium on canceled policies.

(e) If any such insurance carrier shall fail or refuse to make the return required by this Article, the said Commissioner of Insurance shall assess the tax against such insurance carrier at the rate herein provided for, on such amount of premium as he may deem just, and the proceedings thereon shall be the same as if the return had been made.

(f) If any such insurance carrier shall withdraw from business in this State before the tax shall fall due, as herein provided, or shall fail or neglect to pay such tax, the Commissioner of Insurance shall at once proceed to collect the same; and he is hereby empowered and authorized to employ such legal process as may be necessary for that purpose, and when so collected he shall pay the same into the State treasury. The suit may be brought by the Commissioner of Insurance, in his official capacity, in any court of this State having jurisdiction. Reasonable attorney's fees may be taxed as costs therein, and process may issue to any county of the State, and may be served as in civil actions, or in case of unincorporated associations, partnerships, interindemnity contracts, upon any agent of the parties thereto upon whom process may be served under the laws of this State.

(g) **(Effective October 1, 1994 — See editor's note)** Any person or persons who shall in this State act or assume to act as agent for any such insurance carrier whose authority to do business in this State has been suspended, while such suspension remains in force, or shall neglect or refuse to comply with any of the provisions of this section obligatory upon such person or party or who shall willfully make a false or fraudulent statement of the business or condition of any such insurance carrier, or false or fraudulent return as herein provided, shall be deemed guilty of a Class 2 misdemeanor.

(h) Whenever by this Article, or the terms of any policy contract, any officer is required to give any notice to an insurance carrier, the same may be given by delivery, or by mailing by registered letter properly addressed and stamped, to the principal office or general agent of such insurance carrier within this State, or to its home office, or to the secretary, general agent, or chief officer thereof in the United States, or the State Insurance Commissioner.

(i) Any insurance carrier liable to pay a tax upon premiums under this Article shall not be liable to pay any other or further tax upon such premiums, under any other law of this State.

(j) Every employer carrying his own risk under the provisions of G.S. 97-93 shall, under oath, report to the Commissioner of Insurance his payroll, subject to the provisions of this Article. Such report shall be made in form prescribed by the Commissioner of Insurance, and at the times herein provided for premium reports by insurer. The Commissioner of Insurance shall assess against such payroll a maintenance fund tax computed by taking such percent of the basic premiums charged against the same or most similar industry or business taken from the manual insurance rate then in force in this State as is assessed in the Revenue Act against the insurance carriers for premiums collected on compensation insurance policies. The Commissioner shall use the approved experience modifier of an employer in calculating the employer's maintenance fund tax liability under this subsection. Receipts collected under this subsection shall be deposited to the credit of the State Treasurer as general fund revenue.

(k) Every group of two or more employers who have pooled their liabilities pursuant to G.S. 97-93 shall pay a tax upon premiums received in this State in the same manner as the tax is calculated and paid by insurance carriers insuring employers in this State and set forth in subsections (c), (d), (e), and (f) above. (1929, c. 120, s. 73; 1931, c. 274, s. 13; 1947, c. 574; 1961, c. 833, s. 13; 1977, c. 828, s. 7; 1985, c. 119, s. 2; 1985 (Reg. Sess., 1986), c. 928, s. 13; 1989, c. 647, s. 1; 1993, c. 539, s. 682; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993, c. 40, s. 1, effective May 5, 1993, provides: "All insurers writing workers' compensation insurance in this State and groups that self-insure their workers' compensation liabilities in this State, shall file with the commissioner by October 1, 1993, their loss control and accident prevention consultation services plans."

Effect of Amendments. — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 2 misdemeanor" for "misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred ($100.00) nor more than one thousand dollars ($1,000), or by imprisonment for not less than 10 nor more than 90 days, or both such fine and imprisonment in the discretion of the court" in subsection (g).

ARTICLE 3.

Security Funds.

§§ 97-105 through 97-122: Repealed by Session Laws 1991 (Regular Session, 1992), c. 802, s. 12, as amended by Session Laws 1991 (Regular Session, 1992), c. 1030, s. 51.3, effective January 1, 1993.

Cross References. — As to disposition of funds in the Stock Workers' Compensation Security Fund and the Mutual Workers' Compensation Security Fund, see §§ 58-48-105 through 58-48-130.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 1, 1994

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1994 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY

Attorney General of North Carolina